for a writ of error from
a writ of the same in a State Court
Mar 27 affd Sharpe 9.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 124-123

JAMES T. AUSTIN, PLAINTIFF IN ERROR,

vs.

THE BOARD OF ALDERMEN OF THE CITY OF BOSTON.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

FILED NOVEMBER 9, 1867.

SUPREME COURT OF THE UNITED STATES.

No. 271.

JAMES T. AUSTIN, PLAINTIFF IN ERROR,

vs.

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INDEX.

	Original.	Print.
Petition	1	1
Answer	7	2
Judgment	8	3
Judge's certificate	9	3
Clerk's certificate	10	3
Writ of error	11	4
Return to writ	12	4
Citation	13	5
Marshal's return	14	5
Bond	15	5

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Judgment	8	3
Judge's certificate	9	3
Clerk's certificate	10	3
Writ of error	11	4
Return to writ	12	4
Citation	13	5
Marshal's return	14	5
Bond	15	5

1 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

[SEAL.] At the supreme judicial court begun and holden at Boston, within and for the county of Suffolk, on the first Tuesday of April, being the second day of said month, in the year of our Lord one thousand eight hundred aud sixty-seven.

459. James T. Austin, of Boston, aforesaid, counsellor-at-law, by Ivers J. Austin, of said Boston, counsellor-at-law, his next friend, by his petition represents, that in accordance with the requirements of law, and the published notice of the assessors of the city of Boston, the said Ivers J. Austin, for and in behalf of the said James T. Austin, then and now, by reason of age and mental infirmity, incapacitated from transacting business himself, on or about the fifth day of June, in the year eighteen hundred and sixty-six,
2 handed in to the said assessors a written list or statement of all the personal property of the said James T. Austin, claimed or supposed, by the said assessors, to be liable to taxation under the laws of said Commonwealth, to which said list or statement the said Ivers J. Austin, for and on behalf of the said James T. Austin, duly made oath at the time the same was handed in to said assessors, and the said list or statement was thereupon accepted by the *by the* said assessors as and for the list or statement of the said James T. Austin. The said list or statement contained, amongst other items of personal property, an enumeration of the number of shares owned by the said James T. Austin in each of the following named banks, all of which are national banks, located in said Boston, and having their respective capitals invested, according to law, in United States bonds, to wit: The New England National Bank; The Eagle National
3 Bank; The Merchants' National Bank; The City National Bank; The Globe National Bank; The State National Bank, and The Suffolk National Bank; that the total valuation made by the said assessors of said shares owned by the said James T. Austin was the sum of twenty-three thousand nine hundred and eighty-five dollars, upon which said sum the tax assessed by the said assessors was the sum of three hundred and eleven dollars and eighty cents.

Said petitioner further represents to the court, that at the time the said list or statement was handed in to the said assessors, as aforesaid, he presented to them a paper wherein he protested against the assessment of any tax on the said shares, but that the said assessors disregarded the said protest, and laid an assessment on said shares as aforesaid.

Said petitioner further represents to the court, that after
4 the said assessment was made, as aforesaid, he petitioned the said assessors to abate the aforesaid sum of three hundred and eleven dollars eighty cents from the tax on his personal property, upon the ground that the aforesaid shares in said banks are not legally liable to be included in the valuation of his personal property, because the said banks are, as aforesaid, all national banks located in said Boston, and having their capital duly invested, as aforesaid, in United States bonds, and that on or about the eleventh day of

October, 1866, the said assessors refused to make the said abatement.

And said petitioner further represents to the court, that thereafterwards, to wit, on or about the thirteenth day of said October, he petitioned the aldermen of said Boston to revise and reverse the said decision of the said assessors, and for the reasons aforesaid to abate from his aforesaid tax the said sum of three hundred
5 and eleven dollars and eighty cents; but the said aldermen, on or about the twenty-ninth day of said October, refused to abate the said tax, and gave said petitioner leave to withdraw his petition.

Said petitioner further represents to the court, that he is aggrieved by the aforesaid refusal of said aldermen, and that there is error in said ruling and refusal, and the record thereof, to wit:

1st. Because the shares in national banks, having their capital invested in United States bonds, are not liable to be taxed by or under the laws of the several States.

2d. Because, if the several States have authority to tax the shares of said banks, or to include such shares in the valuation of personal property liable to taxation under State laws, (which said petitioner denies,) the laws of Massachusetts authorizing said shares to
6 be taxed, or included in said valuation, does not conform to the act of Congress in that respect, but is inconsistent therewith, and repugnant thereto.

Wherefore, and by reason of many other errors in the aforesaid proceedings of said aldermen, and in the record thereeof, said petitioner prays the court, after due notice to said board of aldermen, to issue a writ of certiorari to said board requiring and commanding them to certify and send into this court their aforesaid proceedings, and the record thereof, that the same may be quashed and held for naught, and that this court may render such judgment as the said board of aldermen should have rendered, or make such order, judgment, and decree in the premises as law and justice shall require.

This petition was entered in this court during the last term thereof, and it was thereupon ordered, that the petitioner give notice to the said aldermen of the city of Boston to appear before
7 the justices of this court, to be holden at Boston, within and for said county of Suffolk, on the first Monday of January, 1867, by adjournment from the first Tuesday of October last, by serving them with an attested copy of said petition, and of this order thereon, thirty days at least before said first Monday of January, that they might then and there shew cause why the prayer of said petition should not be granted; and afterwards, during the term, the parties appeared, and *and* the respondents, by their attorney, C. H. Hill, esq., filed their answer as follows, to wit:

"And now come the mayor and aldermen of the city of Boston, and admit the truth of the facts set forth in the petition; and they assert that the tax assessed upon the petitioner's property, as therein stated, was legally assessed; that their proceedings thereon

were, in every respect, conformable to law; and that the petitioner shows no reason why a writ of certiorari should be granted to him. Wherefore they say, that the petitioner can take nothing by his said petition, but the same must be dismissed."

Thereupon, after a hearing, the case was reserved for the decision of the full court, upon the petition and the answer thereto, and the same was thence continued to the present term.

And now it is ordered by the supreme judicial court for the commonwealth, by its rescript, that the clerk of this court, for said county of Suffolk, make the following entry under this case in the docket of this court, viz: Petition dismissed with costs.

It is therefore considered by the court, on the twenty-ninth day of June, A. D. 1867, that the said aldermen of the city of Boston recover against the said James T. Austin costs of suit, taxed at twenty-four dollars and sixteen cents.

And afterwards, on the fourth day of September, A. D. 1867, the following certificate is filed of record, viz:

Commonwealth of Massachusetts, Supreme Judicial Court.

JAMES T. AUSTIN
vs.
THE BOARD OF ALDERMEN OF THE CITY OF BOSTON.

I do hereby certify, that in the above-named case there was drawn in question the validity of the statute of Massachusetts, passed on the 15th day of May, 1865, entitled "An act relating to returns and taxation of shares in associations for banking, established under the laws of the United States," on the ground that it was repugnant to the statute of the United States, passed on the 3d day of June, 1864, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," and that the decision of the court was in favor of the validity of the said statute of Massachusetts. And this certificate is ordered by the court to be made a part of the record in said suit.

G. T. BIGELOW,
Chief Justice of Sup. Jud. Court of Massachusetts.

I, Geo. C. Wilde, clerk of said supreme judicial court, hereby certify that the foregoing is a true copy as appears of record.

In witness whereof, I have hereto set my hand and affixed the seal of said court this eleventh day of September, A. D. 1867.

[SEAL.] GEO. C. WILDE, *Clerk.*

[5-cent internal revenue stamp.]

Endorsed: 459. Austin, pet. *v.* Aldermen of the city of Boston. Copy of record.

11 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme judicial court of the Commonwealth of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said supreme judicial court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between James T. Austin, plaintiff, and the Board of Aldermen of the city of Boston, is defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said James T. Austin, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this sixteenth day of September, in the year of our Lord one thousand eight hundred and sixty-seven.

[SEAL.] JOHN G. STETSON,
Clerk of the Circuit Court of the United States.

Allowed by—

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

12 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

And now the judges of the supreme judicial court of said Commonwealth make return of this writ by annexing hereto and sending herewith, under the seal of the said court, as within commanded, a true and attested copy of the record and process in the suit within mentioned, and of all proceedings therein.

In testimony whereof, I, George C. Wilde, clerk of said court, within and for said county of Suffolk, have hereunto set my hand and the seal of said court this twenty-fifth day of September, in the year of our Lord eighteen hundred and sixty-seven.

[SEAL.] GEO. C. WILDE, *Clerk.*

Endorsed: James T. Austin, pl'ff in error, *vs.* The Board of Aldermen of the city of Boston.

13 The United States of America to the Board of Aldermen of the city of Boston, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme judicial court of the Commonwealth of Massachusetts, wherein James T. Austin is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Nathan Clifford, Justice of the Supreme Court of the United States, this sixteenth day of September, in the year of our Lord one thousand eight hundred and sixty-seven.

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

14 U. S. OF AMERICA, *Mass. District, ss*:

BOSTON, *September 18th*, 1867.

I hereby certify, that I this day gave in hand to Charles W. Slack, chairman of the Board of Aldermen of the city of Boston, a true and attested copy of this precept.

JOSEPH B. KEYES,
Deputy U. S. Marshal.

Fees, swo. to	$2 12
Copy	1 00
	$3 12

15 Know all men by these presents, that we, James Davis, of Boston, in the county of Suffolk and Commonwealth of Massachusetts, merchant, and Samuel F. Snow, of said Boston, merchant, are held and firmly bound unto the Board of Aldermen of the city of Boston, in the full and just sum of five hundred dollars, to be paid to the said board of aldermen, its certain attorney, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this sixteenth day of September, in the year of our Lord one thousand eight hundred and sixty-seven.

Whereas, lately, at supreme judicial court of the Commonwealth of Massachusetts, in a suit depending in said court between James T. Austin, plaintiff, and the said board of aldermen, defendant, judgment was rendered against the said James T. Austin; and the said James T. Austin having procured a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation, directed to the said board of aldermen, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next. Now the condition of the above obligation is such, that if the said James T. Austin shall prosecute his said suit to effect, and answer all damages and costs, if he fails to make his plea good, then the above obligation to be null and void; else to remain in full force and virtue.

JAMES DAVIS. [L. S.]
S. F. SNOW. [L. S.]

Signed, sealed, and delivered in the presence of—
DANIEL L. TOWER.

Approved:

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States, for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

(Copy.) The above bond is satisfactory.
(Signed) J. P. HEALY,
For City of Boston.

Endorsed: Massachusetts sup. c't. No. 271. James T. Austin *vs.* pl'ff in error, the Board of Aldermen of the city of Boston. Filed November 2d, 1867.

Mr Chief Justice

Supreme Court of the United States.

No. 123. DECEMBER TERM, 1868.

JAMES T. AUSTIN,

PLAINTIFF IN ERROR,

vs.

THE ALDERMEN OF BOSTON,

DEFENDANTS IN ERROR.

BRIEF AND ARGUMENT ON BEHALF OF THE PLAINTIFF IN ERROR.

BOSTON:
ALFRED MUDGE & SON, PRINTERS, 34 SCHOOL STREET.
1868.

SUPREME COURT OF THE UNITED STATES.

No. 123. DECEMBER TERM, 1868.

JAMES T. AUSTIN, PLAINTIFF IN ERROR,

vs.

THE ALDERMEN OF BOSTON, DEFEND'TS IN ERROR

BRIEF OF THE ARGUMENT IN BEHALF OF THE PLAINTIFF IN ERROR.

The question is, what did Congress intend by the phrase used in the 41st section of the currency act, "*at the place where such bank is located, and not elsewhere?*" Does "*place*" mean State, territory, or district, in which a national bank is located, or the city, town or village of its location?

Statute 1864, *chap.* 106 (13 *U. S. stats. at large*, 112).

I.

The States do not, and never did or could possess, by virtue of their sovereignty, the power or right to tax the shares of the national banks. The first proviso of the 41st section of the currency act, is a grant, or operates as a grant, to the States of a new power or a new right to tax the shares. It is not the restriction of a power or right already possessed by them.

1. The right to tax the "means and instruments employed in the exercise of the functions of the Federal government" is exclusive in Congress.

McCulloch vs. *Maryland*, 4 *Wh.* 316.

Osborn vs. *The Bank of the United States*, 9 *id.* 738.

Weston vs. *The City of Charleston*, 2 *Pet.* 449.
Dobbins vs. *The Commissioners of Erie County*, 16 *Pet.* 435-46.
Bank of Commerce vs. *New York City*, 2 *Black*, 620.
Bank tax case, 2 *Wallace*, 200.

2. The National Banking Associations are such means and instruments.

Title. ss. 16, 22, 31, 32, 41, 45.

3. The principles, by which the States are prohibited from taxing the capital of the national banks, apply with equal force to prohibit them from taxing the shares of the capital.

McCulloch vs. *Maryland, ubi sup.* 486-7.
Currency act, ss. 11–12.

4. The inability of the States to tax the shares of the capital does not depend upon any act of Congress, but upon the character of the institutions. It is a constitutional and not a legislative inability.

Cases above cited.

5. That the States have not the original power to tax the shares of the national banks, is recognized by this Court in *Van Allan* vs. *The Assessors;* 3 *Wallace*, 573. Also in the 1st proviso in the currency act and by the State courts which have considered the question.

Wright vs. *Stiltz*, 27 *Indiana Rep.* 338, *and other cases cited post.*

6. The *dictum* of Chief Justice Marshall, in *McCulloch* vs. *Maryland*, (*ubi supra*) does not affect the foregoing positions, because it is there said, that the opinion *does not extend* to such a tax, which was true, because the question was not raised in the case.

7. This Court does not, as erroneously asserted by the Court below, decide that the power to tax the shares of national banks is concurrent in the States and the general government.

A. The language of the Court is misquoted.

B. The division of opinion arose on the constru tion of the 1st proviso; the Court were unanimous that the power to tax was derived solely from that proviso.

8. If the power to tax the shares of national banks was originally concurrent in the States and Congress, this power still remains concurrent, notwithstanding the limitations in the proviso, which, in such case, are merely inoperative, because the States never surrendered their power of taxation and Congress cannot limit it.

McCulloch vs. *Maryland, ubi sup.*

9. The rule that personal property has no *situs*, but follows the domicile of the owner, confers no power on the States to tax the shares of national banks owned by their citizens.

A. The shares still remain under the jurisdiction of the general government, and the *shares* and not the *owners* are taxed. The law of the State must then yield to that of Congress which is supreme.

Dobbins vs. *The Commissioners of Erie*, 16 *Pet.* 435.
Brown vs. *The State of Maryland*, 12 *Wh.* 419.

B. The rule of law, above stated, has no application to the case. It does not bring the shares under the jurisdiction of the States for the purposes of taxation, or for any other purpose.

1. The two characters of national citizenship, and State citizenship are distinct and separable in the same person.

Many citizens of the United States, are not citizens of any State.

Hepburn vs. *Ellzey*, 2 *Cr.* 445.
Corporation of New Orleans vs. *Hunter*, 1 *Wh.* 91.

Persons residing on lands, within a State, ceded to the United States.

Opinion of the Justices, 1 *Met.* 583.
12 *U. S. Statutes at large*, 597, *chap.* 200, *s.* 21.

2. A shareholder in a national bank holds his shares in his capacity of a citizen of the United States and not in his capacity of a citizen of any State; because this property is created by the general government and is in nowise subject to State laws.

3. That the descent and distribution of the shares of a deceased holder, are according to the law of his State domicile at the time of his death, does not impair the foregoing positions.

a. Such descent and distribution, taking effect only after his death, cannot affect his rights or relations to the general government, during his life.

b. The laws of the States, as to descent and distribution, have force only by the comity of the United States, as a part of their own laws, Congress having enacted none in this respect.

Story on Conflict of Laws, ss. 389–90.
Rev. Stats. Mass., chap. 60, *s.* 31.
Gen. Stats. Mass., chap. 30, *s.* 38.
9 *U. S. Stats. at large, chap.* 104, *s.* 5.
Doe. vs. *Vardill*, 5 *B. & C.*, 438.

10. Shareholders in national banks, are, *in their capacity*

of shareholders, parts of the means and instruments for carrying on the general functions of the government.

Currency Act passim.

Dobbins vs. *The Commissioners of Erie, ubi supra.*

II.

Congress has the constitutional power to annex to its grant to the States of a right to tax the shares of national banks, any conditions, limitations or restrictions, which in its judgment may be deemed expedient; and the States are bound to comply with any and all such conditions, limitations, and restrictions, if they undertake to exercise the power thus conferred.

1. This position follows necessarily from that previously established, viz: that the States have not the original power of taxing the shares of national banks.

2. The character of the States, as sovereign, does not alter or modify their obligation as grantees.

Bank of the United States vs. *Planters' Bank*, 9 *Wh.* 904.

Bank of the Commonwealth of Kentucky vs. *Wister*, 2 *Pet.* 318.

Briscoe vs. *The Bank of the Commonwealth of Kentucky*, 11 *Pet.* 257–324.

3. The limitations in the proviso have been held to be binding on the States by this Court, and by every State Court which has judicially considered the point.

Pa. *Markoe* vs. *Hartranft*, *Am. Law Register of June*, 1867, *p.* 487.

N. H. *Huntington* vs. *Burt.* 47 *N. H. R.*

Id. *First National Bank of Portsmouth*, vs. *Portsmouth Id.*

Indiana. *Wright* vs. *Stiltz*, *ubi supra.*

Ohio. *Frazer* vs. *Lieben*, *Am. Law Register*, *June* 1867, *p.* 475.

Maine. *Opinion of the Justices*, 53 *Maine Rep.* 594–96.

Id. *Abbot* vs. *Bangor*, 54. Id. 540.

III.

The phrase used in the first proviso of the 41st section of the currency act, viz., "place at which such bank is located and not elsewhere," was intended by Congress to mean the specific *city, town, or village* in which a bank is located. It was not intended to mean, nor cannot it be so construed as to mean the *State, territory, or district* in which it is located.

1. Wherever in any section of the act, other than the 41st, the word place occurs, it means clearly and distinctly, in all instances but one, either a city, town, or village. In the excepted instance it signifies a banking house. In no instance does it mean, nor can it be made to mean, a state, territory, or district.

Currency Act, ss. 2, 6, 7, 8, 17, 23, 30, 34, 46.

In these sections, the word "*place*" or "*places*" occurs sixteen out of seventeen times of its use. The seventeenth time is in the proviso in question.

2. The meaning of a word having been ascertained from an examination of the whole statute, it must be held to have the same meaning everywhere in the same statute.

Bonham's case 8 *Rep.* 117.
Pennington vs. *Coxe*, 2 *Cr.* 33.
United States vs. *Fisher et al.* *Id.* 358.
Van Allan vs. *The Assessors, ubi supra.*
Rex vs. *Stoke*, 7 *B. & C.* 569.
Rex vs. *Ramsgate*, 6 *id.* 712.
Rex vs. *The Inhabitants of Great Bentley*, 10 *Id.* 527.
Samuel vs. *Nettleship*, 3 Q. *B. R.* 188.

3. The words of a statute are to be taken in their ordinary sense and import.

Lessee of Levy et al. vs. *McCartee*, 6 *Pet.* 109.

And the ordinary sense and import of the word place is very clear.

IV.

An examination of other sections of the currency act, will confirm the correctness of the interpretation of the word "*place*," contended for by the plaintiff in error.

1. Sections 10, 15, 18, 32, where the phraseology used is equivalent to a legislative declaration, that the word "*place*" means city, town, or village.

2. Whenever the regulations, concerning the operations of a bank, require a larger extent of territory to be intended than a county, city, town, or village, the language of the act is changed. The word "*place*" *is then dropped,* and a word of larger meaning used instead of it.

ss. 9, 30, 41, 57.

V.

If it be doubtful whether the construction contended for by the plaintiff in error be correct, the rule as to the construction of public grants should be applied in support of that construction, viz, "where two equally plausible constructions can be given to the same words of a grant, and no other motive intervenes, that construction is to be adopted, which *restricts* the grant, in preference to that which *extends* it."

Ohio Life Insurance & Trust Co. vs. *DeBolt,* 16 *How.* 416–35.
Charles River Bridge vs. *Warren Bridge,* 11 *Pet.* 420–545.
United States vs. *Arredondo,* 6 *Pet.* 737–40.
Mills vs. *St. Clair County,* 8 *How.* 569.
Martin vs. *Waddell,* 16 *Pet.* 411.
Lessee of Nagle vs. *Ahern,* 3 *Irish Law Rep.* 41.
Sewall vs. *Jones,* 9 *Pick.* 414.
Freeland vs. *Hastings,* 10 *Allen,* 575.

The application of this rule in the case at bar. will only *diminish,* but not destroy the revenue which the states expected to derive from the grant.

The construction of the plaintiff in error, is supported by the act of February 10, 1868, and the following cases;

Opinion of the Justices of Superior Court of Maine, ubi sup.
Abbot vs. *Bangor, ubi sup.*
Huntington vs. *Burt, ubi sup.*

VI.

Objections to the construction contended for by the plaintiff in error, stated and replied to.

First Objection. The tax, on the shares of the plaintiff in error, was laid on shares in national banks, located in the city of his residence, and therefore the statute of Massachusetts, under which he was taxed, so far as he is concerned, conforms to the limitation of the proviso.

A. This position is an evasion of the question, which is, whether the State act, under which the plaintiff in error was taxed, conforms to or is repugnant to an act of Congress, and not whether the plaintiff accidentally happened to be rightfully taxed, for if the statute is void, all taxes imposed under it were wrongfully imposed.

B. The third section of the State law, under which the plaintiff in error was taxed, is an indivisible whole. It is incapable of a separation into parts, so as to be valid as to some persons and invalid as to others. If this section is invalid, the plaintiff in error was wrongfully taxed, although by proper provisions he might have been taxed in accordance with the terms of the proviso.

Commonwealth vs. *Hitchings*, 5 *Gray*, 482-85. *Appendix, Section* 3.
Massachusetts Gen. Stats. C. 11. *Sec.* 12, 22, 27.
Wellington et al. Petrs, 16 *Pick.* 86-95.

C. No tax upon shares in national banks, can be imposed under the grant in the proviso, unless by State laws specially passed, authorizing its imposition, and conforming to the limitations of the proviso.

Abbott vs. *Bangor, ubi supra.*

Second Objection. The proviso is merely directory as to the place of taxation.

A. Affirmative words will render a statute imperative, if they are full, explicit and peremptory, and show that no discretion was attempted to be given.

Davison et al. vs. *Gill,* 1 *East,* 64.
Oliver vs. *The Washington Mills,* 11 *Allen,* 268-78.

B. If an affirmative statute introduces a new law and directs a thing to be done in a certain manner, it shall not be done in any other manner, although there are no negative words.

Regina vs. *The Mayor of Leeds.* 11 *A. & E.* 512.

C. Negative words in an affirmative statute render it imperative.

Rex. vs. *Leicester,* 7 *B. & C.* 12.

D. The words of the proviso, although negative in form, are affirmative in substance, with strong negative words added; confer a new jurisdiction on the States; and direct the tax to be assessed in a certain manner; therefore the words should be construed by the rules applicable to affirmative statutes.

E. The foregoing conclusions are confirmed by the decisions, that all the limitations are binding on the states, and must be strictly complied with.

Third Objection. The construction, contended for by the plaintiff in error, directs or regulates the mode of taxation adopted by the States; and Congress has no power to annex to their grant a condition which has such an effect.

A. The mode of taxation adopted by a State includes the whole code of its tax laws as contained in its statutes and expounded by its courts; amongst the various provisions are comprehended the rate and the manner and place of assessment.

B. The limitation, as to rate, has been held by this Court as obligatory upon the States, and by the Court, in the case at bar, as binding on Massachusetts.

Van Allan vs. *The Commissioners, ubi supra.*
Austin vs. *The Aldermen, etc. ubi supra, p.* 362.

C. If Congress has the power to impose one limitation directing or limiting the mode of taxation adopted by a State, it can impose as many limitations of that character as it deems proper, it being within the exclusive power of the State to accept or reject the grant as it chooses.

D. The expediency of the limitation as to rate, that it prevents hostile or discriminating legislation against the banks, cannot confer the *right* to impose it.

E. The right of Congress to limit the place, so far as it regards the State where the owner of shares resides, is conceded by the Court below, which therefore concedes the whole question as to the validity of the limitation as to place. Gen. Stats. of Mass., c. 11, s. 1. 2.

Dwight vs. *The Mayor, etc. of the City of Boston.* 12 *Allen,* 322.
Austin vs. *The Aldermen, etc. p.* 364.

F. It is not true that Congress, by annexing the limitations in the proviso, in any way interferes with the mode of State taxation, or seeks, or pretends to regulate that mode, either by the limitation as to rate, or as to place, or as to the valuation of the shares.

1. The power granted to the States is permissive and not mandatory. They are free to accept or reject the power granted as they may choose.

2. Analogous cases.

a. The cession of jurisdiction to the United States, of land lying within the limits of this State, is always accompanied by conditions, which are binding on the United States, if accepted by them.

Stat. Mass. 1819, *c.* 69, *ceding part of Long Island.*
Id. 1867, *c.* 159, *ceding land for the enlargement of Watertown Arsenal.*
Constitution of U. S. Art. 1, *s.* 8.
United States vs. *Cornel.* 2 *Mason, C. C. R.* 65–6.
Scaright vs. *Stokes.* 3 *Howard,* 151–168.

b. Grant by the United States of land for colleges.

12 *U. S. Statutes at Large,* 503, *c.* 130–*s.* 3.

c. *Currency Act, s.* 57, prescribing the State courts where suits against national banks may be brought.

Gen. Stats. of Mass., c. 113, *sec.* 5, *pl.* 3.

Fourth Objection. That the construction contended for by the plaintiff in error, is contrary to the intention of Congress.

A. This position has already been sufficiently refuted in the discussion of the several sections of the act where the word place occurs.

B. The argument of the Court below, in support of the objection, is founded upon the fallacy, that the States have the original power of taxing the shares of national banks, without leave of Congress.

C. This argument amounts only to an *argumentum ab inconvenienti*, and the inconvenience relied on by the Court below exists only in Massachusetts, and besides being the weakest kind of argument it is admissible only in extreme cases.

United States vs. *Fisher et al.*, 2 *Cr.* 358.

D. To be of any force, in the case at bar, the inconvenience should be universal, but the inconvenience does not exist in, at least, one State, viz. California.

Providence Bank vs. *Billings*, 4 *Pet.* 562.
California Statutes, chap. 127, *ss.* 18, 19.
Id. chap. 12, *s.* 26.
Id. chap. 16.

E. If the word place was not intended to mean the city etc., in which the bank is located, Congress would not have used the word in the 41st section, but would have changed it to a word of broader signification, as it did in other sections of the same act, where a larger extent of territory was required for the purposes of its intention.

F. Statutes cannot be construed against the plain meaning of the words, by speculations or *suppositions* as to the intention of the Legislature, as the Court below have done in their construction of the word "place."

Rex vs. *Stoke*, 7 *B. & C.* 569.
Rex vs. *Ramsgate*, 6 *B. & C.* 712.
Rex vs. *The Inhabitants of Great Bentley*, 10 *B. & C.* 527.
Samuel vs. *Nettleship*, 20 Q. *B. R.* 188.
Dean vs. *Reed*, 10 *Pet.* 527.

G. The alleged harmony, between the construction of the Court below and the 40th section, does not exist, or if it does exist, proves nothing to the purpose.

H. The case of *Markoe* vs. *Hartranft*, cited by the Court below to support their construction, does not support it, the question as to the construction not arising in the case.

Conclusion from the foregoing positions:

The opinion of the Court below is clearly erroneous in two particulars. 1. In holding that the States have the original right, as sovereignties, to tax the shares of the national banking associations, independent of any grant or concession in this respect by Congress.

2. In their construction of the act of Congress by which the national banking associations were established, by which construction they have adopted an erroneous and enlarged interpretation of the word "*place*" as used in the 41st section of the currency act.

The judgment of the Court below should therefore be reversed, in order that the plaintiff in error may have a trial of his rights without prejudice from any influence which an erroneous construction of an act of Congress may be presumed to have had upon the mind of the Court.

ARGUMENT.

MAY IT PLEASE YOUR HONORS:

The national banking associations, established by *Stat.* 1864 *c.* 106 (12 *U. S. Statutes at large,* 112), were created by Congress in the execution of its power to provide the means and instruments by which certain trusts of the government might be performed.

The act, including the provisos of the 41st section, is a legislative declaration, that these associations and the shares therein, are not subjects of State taxation except under a grant or concession of Congress. The provisos are all permissive and prohibitory or restrictive.

The first of the provisos, under which the question in the case at bar arises, is in the following words:

"*Provided*, that nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is imposed upon other moneyed capital in the hands of individual citizens of such State:" *Id p.* 112.

This proviso therefore, contains three limitations upon the power granted in it to the States of taxing the shares of national banks: viz, 1*st* Upon the *manner* of assessment. 2*d* Upon the *place.* 3*d* Upon the rate.

Massachusetts accepted the grant and, exercising the authority conferred, enacted its statute of 1865, c. 242, of which the following is the third section:

"The assessors of each city and town in which any shareholder in such association resides, shall include all shares in such associations held by persons resident and liable to taxation in said city or town, in the valuation of the personal property of such person, for the assessment of all taxes imposed and levied in said town by authority of law, to be assessed at the same rate, and subject to the same deductions as shares of State banks and other moneyed corporations in the hands of the citizens of such city or town." *

The question before the Court below, stated generally, was, does this section of the law conform to the authority conferred by the proviso?

It is conceded that it conforms to the first and third limitations in the proviso, viz: that as to the *manner* of assessment and that as to the *rate* of taxation.

In respect to the second limitation, viz, that as to the *place* of taxation, it was contended in the Court below, that the section does not conform to it.

The parties, applying for banking privileges are obliged in their articles of association, to designate the "particular county, and city, town, or village," where the business of the association is to be carried on. *Sec.* 6.

The proviso authorizes the State to include the shares of the national banks in the valuation of personal property in the assessment of taxes imposed by or under State authority "*at the place where the bank is located*," adding the prohibition "AND NOT ELSEWHERE." That is to say, as the plaintiff in error maintained, the State law, in order to conform to this limitation, should have authorized the assessors to include the shares of the national banks in the valuation of the personal property of the holders only in the place, i.e. in the city, county or village, where the banks are located. But the third section of the State law disregards the limitation as to place, by requiring the assessors to include these shares in the valuation, not in the

* A copy of the act is annexed hereto.

city, town or village only where the bank is located, but *elsewhere*, viz, in the town *where the shareholders reside* on the first day of May.

The system of taxation, prevailing in Massachusetts, is to include in the valuation of the personal property belonging to its taxable citizens, every thing of that nature which they own in any part of the world, and to assess the taxes upon such property, in the town, or city where they reside on the first day of May.

Thence it is clear, that under the State act, accepting the power conferred to tax the shares of national banks, shareholders, in these banks, residing in cities, towns, or villages, where no banks are located, may be assessed there, for shares which they own in banks located in cities, towns or villages, where they do not and never did reside.

The precise question then, before the Court below was this, viz, what did Congress intend to be the meaning of the word "*place*," used in the proviso?

Does that word, there, signify the State, territory or district; or does it signify the particular city, town, or village, in which a national bank is located?

The Court below decided

"That the true construction of the proviso does not confine the assessment of the tax to the place where the bank is located, and that it merely requires that the tax, to be valid, should be imposed under the State authority existing at the place where it is thus located." *Austin* vs. *The Aldermen*, etc. 14 *Allen*, 359-64. "We think the question whether the taxation of the shares which was allowed to the States, should be imposed in the State where the bank was situated, or in that where the stockholders might reside, was that which it was designed to settle by the proviso." *Id.* "We, therefore, think that the reference in the proviso to 'the place where the bank is located,' was designed to define the State authority which was to be allowed to impose a tax, and not to limit the place of assessment." *Id.* 365.

The question, then, before this Hon. Court is, whether that construction of the proviso is right? In other words, with what intention did Congress use the phrase, "*place where such bank is located*"?

Upon this question the plaintiff in error has the honor to submit the following propositions:

I.

The States do not, and never did, or could possess, by virtue of their sovereignty, the power or right to tax the shares of the national banks. The first proviso of the 41st section of the Currency Act, is a grant, or operates as a grant, to the States of a new power or a new right to tax the shares. It is not the restriction of a power or right already possessed by them.

1. The right to tax the "means and instruments employed in the exercise of the functions of the Federal Government is exclusive in Congress."

McCulloch vs. *Maryland*, 4 *Wh.* 316.
Osborn vs. *The Bank of the United States*, 9 *Id.* 738.
Weston vs. *The City of Charleston*, 2 Pet. 449.
Dobbins vs. The Commissioners of Erie County, 16 *Pet.* 435. 46.
Bank of Commerce vs. *New York City*, 2 *Black*, 620.
Bank Tax Case, 2 *Wallace*, 200.

2. The National Banking Associations are such means and instruments.

This proposition is sustained by the whole character and structure of the act. It is entitled, "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." It enacts that the bills of the banks shall be received throughout the country as money. The bills are payable at par, everywhere

in the United States, for the liquidation of all debts due *to* the United States, except duties on imports, and of all debts due *from* the United States, "except interest on the public debt and in redemption of the national currency." *Sec.* 23. Other sections, viz, §§ 16, 22, 31, 32, 41, 45, show that the associations are, and were intended to be, means and instruments for carrying on the operations of the government, although many of them having no national funds on deposit, may not, strictly, be called fiscal agents of the government. Moreover, Congress would have no power to incorporate even a single banking association, much less several hundred, with any other view. To maintain that such associations are not means and instruments for carrying on the operations of the government, would be, in fact, to maintain that the whole system is unconstitutional to its core.

3. The principles which prohibit the States from taxing the capital of the national banks, apply with equal force to prohibit them from taxing the shares of the capital.

In the case first cited above, Chief Justice Marshall states the law thus:

"All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident"—p. 486. "The sovereignty of a State extends to *everything which exists by its own authority or is introduced by its permission;* but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them." p. 486–7.

These remarks apply with equal force, to a tax levied by State authority upon the shares into which the capital of a national bank is divided, as to a tax, levied by such authority,

upon the capital itself. The shares of the national banks are not created by the States; do not exist by their authority; nor are they introduced into any State by its permission. The obligation of the corporations to divide the capital into shares; their par value; the mode of transferring them; the rights of the transferees; the individual liability of the shareholders, with its limitations; (*Currency Act s.* 12,) the right and manner of stockvoting; (*Id. s.* 11,) in short the existence of the shares, all their properties, all their functions, their character as personalty, and their entire vitality, are established by, and depend solely, upon the same act of congress which creates the institutions, and authorizes the formation of the capital, of which the shares are the parts. If the capital of each bank is under the exclusive jurisdiction of Congress, all the parts, of which the capital is composed, must be equally so; for it is a manifest absurdity to contend that the whole capital is under the jurisdiction of one government and all the parts of that whole are under the jurisdiction of another government. Therefore it follows, that if a State tax the shares of a national banking association, it taxes property created, as Chief Justice Marshall says, "not by its own constituents but by people over whom they claim no control." It is not insisted here, that to tax the shares, is the same thing as to tax the capital of a bank. This Court has decided otherwise and such a position is not necessary to the argument. It is contended only, that whether, to tax the shares is or is not to tax the capital; whether it is or is not to tax the property in which the capital is invested; whether it is or is not, directly or indirectly, to tax the securities of the United States as a part of the capital; whether Congress has or has not the constitutional power to grant to the States this right of taxing the shares, nevertheless, in whichever way these questions have been or may be decided, it is clearly true that to tax the shares is to tax property created solely by the United States, and over which the jurisdiction of no State ex-

tends. That the States have no original right, by virtue of their sovereignty, to tax such property. Such right exists, if at all, solely by the permission, leave, license, or grant of the United States, which is found only in the first proviso of the 41st section of the currency act.

This Hon. Court, in the case of *Van Allan* vs. *The Assessors*, 3 *Wallace*, 573, use the following language:

"As it respects a subject matter over which Congress and the states may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the states, there is no doubt Congress may withhold the exercise of that authority, and leave the states free to act." p. 585.

"The power of taxation under the constitution, as a general rule, and as has been repeatedly recognized in adjudged cases in this court, is a concurrent power. The qualifications of the rule are the exclusion of the states from the taxation of the means and instruments employed in the exercise of the functions of the Federal Government." *Id.*

It is respectfully submitted that the qualification of the rule, as above stated, does not depend upon the exclusion of the States, *by an Act of Congress*, from the exercise of that power upon the means and instruments employed in the exercise of the functions of the Federal Government. No clause in the charter of the United States Bank contains any such prohibition, either directly or indirectly. No clause in the act authorizing the creation of the stock for which Weston was taxed in Charleston, contains any such prohibition. The cases of *McCulloch* vs. *Maryland*, *Osborn* vs. *The Bank of the United States*, *Weston* vs. *The City of Charleston*, and all others of that class, were decided on the ground, not that Congress had prohibited the taxation, but that the States never had the power claimed. The character of the subjects exempted them from State taxation. The inability arises from a constitutional and not from a legislative prohibition. The power to tax is exclusive in Congress, because the subjects of taxation are under the exclusive jurisdiction of Congress. "We find then, on just theory, a total failure of this original

right to tax the means employed by the government of the union, for the exercise of its powers. *The right never existed, and the question whether it has been surrendered cannot arise.*" *McCulloch* vs. *Maryland*, 4 Wh. 487.

The States, therefore, never had the supposed concurrent power of taxing the shares of the national banks. Like the power of taxing the capital it is exclusive in Congress, because the capital and its parts or shares are solely under the jurisdiction and control of Congress, by whom both were created. A power which does not, and never did or could exist, cannot be concurrent with one which does exist. Therefore, no legislation by Congress was required to forbid the taxation. It follows then that, except by force of some grant by Congress, the character of the shares as parts of the capital would constitutionally exempt them from taxation by the States. The proviso removes the disability, and this removal of the disability to tax the shares, it is admitted, for the purposes of this argument, is a constitutional exertion of power by congress. To remove by legislation a disability to do an act, is to grant by legislation the power to do it. The act, therefore, instead of being *passive*, which is stated by this honorable Court as the mode in which Congress leaves the States free to exercise a power concurrently existing in the general government and the states, is *active*, and through the proviso confers a right, although it is a right modified by limitations. Thence it follows that the proviso is a grant from which alone the States obtain the power to tax the shares of the national banks.

That the States have not the original power of taxing these shares is assumed as an undeniable proposition by this Court in the case of *Van Allan* vs. *The Assessors*, where the majority of the Court say,

"In the granting of chartered rights and privileges by the government, especially if of great value to the corporators, certain burdens are usually, if not generally, *imposed as conditions of the grant.* Accordingly we find them in this charter."

The fourth of the *burdens* enumerated by the Court, is

"*A State tax upon the shares of the associations held by the stockholders, not greater than assessed on other moneyed capital in the State, nor to exceed the rate on shares of State banks.*"

"*These are the only burdens annexed* to the enjoyment of the great chartered rights and privileges that we find in this act of Congress; and no objection is made to either of them except the last,—*the limited state taxation.*" p. 582-3.

Admitting *a. g.* that this is a tax of the bonds or capital stock, the Court say:

"It is but *a condition annexed to the enjoyment of this new use and new application* of the bonds;"

And if Congress possessed the power to grant these new rights and new privileges,

"The *power to annex the conditions* is equally clear and indisputable." "*The tax is the condition* for the new rights and privileges conferred upon these associations." p. 583.

The entire argument of this Hon. Court assumes, as self-evident, that the State tax on the shares is a *burden or condition annexed* to the grant of banking powers by the United States. But if the power to tax the shares of national banks is original in the States, — if it existed in the States by virtue of their sovereignty, as soon as the banks were organized, such power could not properly be called a burden or condition *annexed by congress;* nor would the objection made by the able counsel in the case as to the unconstitutionality of the condition have had any pertinence.

The minority concur in this view, by saying, "we do not understand the majority of the Court as asserting that shares of capital invested in national securities, could be taxed without authority from Congress;" p. 593.

The same doctrine is held in *Wright* vs. *Stiltz*, 27 *Indiana Reports*, 338–340, a case decided by the Supreme Court of Indiana, where it is said,

"National banks, then, take their franchises upon the terms that their shares shall be subject to the burden of taxation by States, with certain limitations; and they cannot exist unless they invest at least one third of their paid in capital in United States Bonds, and they may lawfully so invest it all. It seems to result, then, that by the very act of becoming members of such a banking association, *the shareholders in consideration of the franchises thus obtained, surrender to the States the abstract right to hold as exempt from State taxation such shares*, and that the power of the States to tax the shares, cannot be, in any sense, dependent upon the fact that a part or the whole of the capital of the association is invested in government bonds.

If the power to tax these shares was original in the States, there could be no abstract right which the shareholders could surrender.

In this connection, the fact is to be noticed, although not hitherto relied upon, because it was unnecessary to the abstract argument, that the capital of each of the national banks, upon his shares in which the plaintiff in error was taxed by the State, was invested according to the provisions of the Currency Act, in bonds of the United States.

The want of original right in the States to tax the shares of the national banks without a grant from Congress, derives support from the *third* proviso of the 41st section, which renders the real estate of the association subject to State, county, and municipal taxes, "to the same extent, according to its value, as other real estate is taxed." This provision shows that in the opinion of Congress, the character of the institutions would exempt such real estate from State taxation. Therefore the disability was removed by this proviso, which in effect grants to the State the power to tax it.

Against the views thus presented, may be adduced the *dictum* of Chief Justice Marshall in the case of *McCulloch* vs. *Maryland*, which is in these words.

"This opinion does not deprive the States of any resources they originally possessed. It does not extend to a tax paid by the real

property of the bank. in common with the other real property within the State, *nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the State.*"

This "*great dictum*" of the Chief Justice has been received and acted upon, as if it were a judicial decision that the shares of the United States Bank were taxable throughout the Union.

Considered, however, in its true aspect, it is a *mere dictum;* a mere limitation of the decision pronounced, to the exact case before the Court. Neither the Court, nor the Chief Justice who delivered the opinion, it is respectfully submitted, intended to decide, or did in fact decide, either that the real estate of the bank, or the shares of its capital, were or were not taxable by the State. The words are, that this opinion does not *extend to such a tax*, which is true, because the question, whether the shares were subject to original State taxation, was not presented. The decision did not deprive the States of any power they originally possessed; but the question, whether or not they did in fact originally possess the power of taxing the shares, was not raised, and therefore was not decided either way. It can hardly be deemed an intimation by the Court, that such a tax was or might be legal. To these considerations it may be added, that although much similarity exists between the United States Bank and the national banks, there are two prominent distinctions between them, which render the dictum, entirely inapplicable. These distinctions are: 1st, Then, there was but one bank, furnishing only a very limited amount of circulation; now, there are many hundreds, furnishing nearly the entire circulation of the country. 2d, In the United States Bank, no part of the capital was required to be invested in the securities of the United States, whereas, now, nearly the whole capital of all the banks is so invested.

The question has, therefore, at this time, assumed an importance vastly greater than it had when the *dictum* was delivered.

If that great magistrate were now alive, it is not improbable that he would reverse it.

Even the Court below adopt the same view, when they say of it: "This remark was not essential to the decision of the case, and has only the force of a disclaimer of the intention to make a broader application of the doctrines on which the decision rests than was required by the judgment rendered."

Austin vs. *The Aldermen*, p. 361.

But the same Court assert that —

"In subsequent cases" (subsequent to *McCulloch* vs. *Maryland*, "the distinction between a tax upon a bank, or the capital of a bank, established by Congress, and a tax upon the shares of its stock owned by citizens of a State, has been fully recognized; *and it has been held by the Supreme Court of the United States that the States have the right to tax the stock held by their citizens in the national banks, except so far as the act of Congress has expressly or by implication, restricted the exercise of the right.*" *Id.* 362.

The Court below, therefore, in effect say that the right to tax the shares has been decided to be original in the States, subject to restrictions imposed by Congress. But no such decision has been made by this Hon. Court, unless it can be found in one of the recent cases under the currency act. For twenty-eight years prior to the passage of this act in 1864, no national bank existed. From the case of *Wyman* vs. *Osborn*, decided in 1824, up to 1836, when the charter of the United States Bank expired by limitation, no case can be found in which such a point was raised, much less decided. Accordingly, to support their assertion, the Court below cite *Van Allan* vs. *The Assessors*, using this language:

"In stating the reasons of the decision the Court say that *as such a tax* respects a subject-matter over which Congress and the States may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the States, there is

no doubt Congress may withhold the exercise of that authority, and leave the States free to act.' The whole Court concurred in the decision; the only division of opinion being upon the question whether the shares of the capital of national banks were subject to State taxation without any reference to the amount of such capital invested in bonds of the United States." *Austin* vs. *The Aldermen*, &c. p. 362.

This quotation of the language used in the opinion in *Van Allan* vs. *The Assessors*, represents this Court as deciding that a tax upon the shares of national banks, is a subject over which Congress and the States have concurrent jurisdiction. Even if the quotation be correct, it is not a *decision*, but only a *dictum*, and was unnecessary to the question before the Court. *But the language is misquoted.* This Court, it appears to the plaintiff in error, did not say, nor intend to be understood as saying, that such a tax — meaning the tax upon shares — respected a subject matter over which Congress and the States have a concurrent power. The words are:

"It is said that Congress possesses no power to confer upon a State, authority to be exercised which has been exclusively delegated to that body by the Constitution, and, consequently, that it cannot confer upon a State the sovereign right of taxation; nor is a State competent to receive a grant of any such power from Congress. We agree to this."

"*But as it respects* a subject-matter over which Congress and the States may exercise a concurrent power, but from the exercise of which," etc.

The court below assume, that the pronoun "IT," in the phrase "*but as it respects*," refers to the tax authorized to be levied on the shares; whereas it is clear from the context, especially from the next preceding paragraph, quoted above, that the pronoun "IT" was used indefinitely, and that the eminent judge, who delivered the opinion, did not intend to assert, and much less to represent this Court as deciding that *this tax* respected a subject matter over which Congress and the States had concurrent jurisdiction, but intended only that whenever *any* subject matter

of legislation was such, that Congress and the States had concurrent jurisdiction over it, Congress might leave the States free to act in regard to such subject, not asserting whether the tax in question was or was not such a subject. The Court were unanimous in the opinion that the authority to tax the shares was conferred solely by the proviso; the case rested entirely upon its construction, and upon that point alone the division of opinion occurred. Both the majority and minority sought to ascertain the intention of Congress as declared in the proviso. The former maintained the proposition, "that under the national currency acts, the shares of the capital of national banking associations are subject to State taxation without any reference to the amount of such capital invested in bonds of the United States." *p.* 589.

The minority were of opinion "that taxation by the States of the shares of national banking associations, without reference to the amount of the capital invested in national securities, *is not authorized, nor was intended to be authorized by Congress.*" When therefore, the Court below assert, that this Hon. Court were unanimous in deciding that the tax upon shares in national banks was a subject over which Congress and the States have concurrent jurisdiction, which, in effect, amounts to asserting, at least by implication, that the States have the original power of taxing the shares, they make a sheer mistake; for no such question was raised; no such question was decided; no such question was alluded to.

As a further answer to the position that the States have the original power of taxing the shares of national banks, subject to limitations imposed by Congress, it is to be said that, in such case, this power still remains concurrent, notwithstanding the limitations, which, upon the theory of original right, are altogether idle and inoperative. They may and ought to be disregarded by the States. For the original, inherent power of a State, in the matter of taxation, cannot be restrained or dimin-

ished by Congress. If it exist over any given subject, it exists to the utmost possible extent, from its very nature as a sovereign right. Except in regard to taxes on imports and exports, which are called *duties* and not *taxes*, the States have never surrendered their right of taxation. If then, the States possess the original right to tax the shares, Congress has no more power to limit the manner, place, or rate of taxing the shares, than they have to limit the power of the States to tax real property within their jurisdiction. If, by virtue of its original sovereign power, a State can impose, without a grant from Congress, any tax, however small, upon the shares of the national bank, it can, by virtue of the same power, impose upon them, in its unrestricted discretion, any tax however large. The only ground upon which the limitations can be held obligatory on the States, is, that they do not possess this supposed original right, but obtain it solely from the leave, permission, or grant of Congress. The theory of original right places the existence of the banks at the will of the State in which they are located; it being clear, that upon such theory, so large a tax may be imposed, as to render the shares valueless.

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create, that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other in respect to those very measures is declared to be supreme over that which exerts the control, are propositions not to be denied." *McCulloch vs. Maryland* 4 *Wh.* 487.

These propositions, although applied to the right claimed to tax the bank, are just as pertinent to the original right to tax the shares. To destroy the bank by excessive taxation, can as well be accomplished by an excessive taxation of the shares, as by an excessive taxation of the capital. The only way to avoid such a result under the currency act, would be, for all the shareholders to reside in one State, and the bank to be located in another,

a condition of things obviously impossible, and not contemplated as possible by the act.

But then it is said, that the shares in national banks are personal property, and are declared to be such by the currency act itself. That the owners of shares in such banks located in Massachusetts, who are domiciled in that State, are subject to the laws of the State. That personal property has no *situs*, but follows the domicile of the owner; and that, therefore, the shares can be taxed by State sovereignty, which has jurisdiction over all persons and property within its territory.

To this argument there are two replies;

1*st*, That the owner, although under the jurisdiction of the State, is still equally under that of the United States. That it is not the owner of the shares who is taxed, but the shares themselves.

In *Dobbins* vs. *The Commissioners of Erie*, 16 *Pet.* 435,

the plaintiff was an officer under the United States, in the revenue cutter service; was domiciled in Pennsylvania; and was rated and assessed, under the State law, for the emoluments of his office. It was contended in argument, that it was the citizen who was rated and assessed, and not the emoluments of the office.

In answer to this argument and as the foundation of their decision, the Court say,

"The only sense in which a tax is a personal charge, is, that it is assessed upon personal estate and the profits of labor and industry. It is called a personal charge, to distinguish such a tax from the tax upon lands and tenements, which is enforced without any regard to the persons who are the owners. *Taxes are never assessed, unless it be a capitation tax, upon persons as persons*, but upon them on account of their goods, and the profits made upon professions, trades, and occupations. They are so imposed, because public revenue can only be supplied by assessments upon the goods of individuals—'comprehending under the word "goods" all the estate and effects which every one hath, of whatsoever sort they be. Taxes regard the persons of men only be-

cause of their goods.' The goods then are taxed and not the person. But those who pay the tax are taxable persons, because they are under an obligation to contribute from their means to the necessities of the State. The obligation, however, only becomes a charge upon the person in consequence of the power of the State to enforce the payment of taxes by coercion. This power extends to the sequestration of the goods, and the imprisonment of the delinquent. A tax, according to the object on which it is laid, may be a personal charge; but that is a very different thing from its becoming a charge upon the person, in consequence of the coercion which may be provided by law to enforce the payment." — "*We have been more particular in noticing this argument, because it enabled us to put the point upon which it was intended to bear, upon right principles.*"

According, then, to the principles of this case, the shares are taxed and not the owner. Although, therefore, being personal property, they have no *situs* but follow the owner and are within the jurisdiction of the State where the owner has his domicile, yet that fact does not withdraw them from the jurisdiction of the United States which extends over every person and thing within their territorial limits. By the application of this fiction of law, the shares come under two jurisdictions — the one of the United States, by the laws of which they are not taxable to the owners by the States unless by permission of Congress, — the other that of the State of the owner's domicile, by the sovereign power of which they are taxable to the owners, without such permission. Here, then, is a conflict of laws. Those of the State must therefore yield, because those of the United States are supreme. This fiction of law, therefore, cannot operate to support the alleged right of original power in the States to tax these shares, even if it be admitted to apply to the case.

This position is sustained, not only by general considerations, but by the case of *Brown* vs. *The State of Maryland* 12 *Wh.* 419, where Chief Justice Marshall says:

"It has been contended, that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay

duties on imports, would abridge the acknowledged power of a State to tax its own citizens, or their property within its territory."

"We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce."

"It has been observed, that the power remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and State governments, as a vital principle of perpetual operation. It results necessarily, from this principle, that the taxing power of the States must have some limits. It cannot reach and restrain the action of the general government within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the execution of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the States may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a State from taxing any article passing through it, from one State to another, for the purpose of traffic? or from taxing the transportation of articles passing from the State itself, to another State for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress, to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument further, or to give additional illustrations of it, because the subject was taken up and reconsidered with great attention in *McCulloch* vs. *Maryland*."

But 2d. While the rule, that personal property has no *situs* and follows the domicile of the owner, is admitted, the application of the rule, to bring the shares of national banks within the power of the State to tax them, or for any other purpose, as under State jurisdiction, is denied.

The mistake of the argument in this respect, consists in over-

looking or confounding the distinction between *local* and *national* domicile; that between citizenship in a State, and citizenship in the United States; and that between allegiance to a State and allegiance to the United States.

Most, but not all American citizens, are endowed with two characters, and owe a double allegiance. In their character of citizens of a State, they owe allegiance to the State of their domicile, and are subject to and bound by its laws, which have power over them, solely by virtue of their character as citizens of such State. As citizens of the United States, they owe allegiance to the United States, and are subject to and bound by the laws of the general government, which have power over them, only by virtue of their character of American citizens. Any man may, at pleasure, throw off his allegiance to the State of his origin, or of his adoption, and, by acquiring a domicile in some other State, obtain new rights of citizenship, in some cases of a nature quite different from those he had previously enjoyed. But in so doing he does not alter or impair his allegiance to the United States. He still retains his character of an American citizen, and is equally subject to the laws of the Union. While it is true, that all the citizens of a State are *ipso facto*, citizens of the United States, the converse of the proposition is not true. Citizens of the District of Columbia; (*Hepburn* vs. *Ellzey* 2 *Cr.* 445;) citizens of a territory; (*Corporation of New Orleans* vs *Winter* 1 *Wh.* 91;) persons residing on lands, within the territorial limits of the State, ceded to the United States; (*Opinion of the Justices*, 1 *Met.* 583;) individuals residing on the public domain of the United States, by the same principles, are not citizens of any State; owe no allegiance to any State; and are not bound by the laws of any State; nevertheless they are citizens of the United States and owe allegiance to and are bound by the laws of the Union. To obtain the character of an American citizen, it is not even required, in all cases, that the individual should have a domicile in the country; for it is pro-

vided by *Stat.* 1852, *c.* 200, *s.* 21; (12 *U. S. Statutes at large,* 597.)

"That any alien, of the age of twenty-one years and upwards, who has enlisted or shall enlist in the armies of the United States, either the regular or the volunteer forces, and has been or shall be hereafter honorably discharged, may be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become a citizen of the United States, and that he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen."

The two characters of State citizenship and national citizenship; the two duties of State allegiance and national allegiance, are clearly separable and distinguishable in the same person. Whenever the two characters, or the duties springing from them, conflict, the national character takes the precedence. Privileges conferred by the general government are usually, unless upon specific individuals by name, conferred upon persons as citizens of the United States. Crimes or offences against the laws of Union, even when committed within the territorial limits of a State, are punishable only by the laws of the Union and not by those of the State within which they are committed. All the general laws of the Union are addressed, not to citizens of States, territories, or districts, as such, but to citizens of the United States; and thus embrace every person within the territorial limits of the country owing allegiance to the Union.

The navigation acts; the naturalization acts; the copyright acts; the patent rights acts; and many others which might be named, all refer to and act upon individuals as citizens of the United States and not as citizens of any State. All the treaties of the United States with foreign powers, ignore, in the same way, the relations of one State to another, or to the general government, and describe the persons, to whom they refer, in their national character, as citizens of the United States.

Under the treaties with foreign powers, if any question should arise whether a person were or not embraced by the term em-

ployed, viz, citizens of the United States, that question would be determined, not by settling merely the fact that he is domiciled in a particular State, but by proving that he is domiciled any where within the territorial jurisdiction of the country. So far as such a question would be concerned, domicile in a State would be conclusive evidence of his national citizenship, but still it would be only evidence made conclusive by the constitution. It would not be the sole evidence, for he might fail to prove such domicile and it would be enough for him to show that he resided in a territory or district, or was a discharged soldier naturalized under the act of 1862, or a resident within the State on land ceded to the United States.

That the distinction between State and national citizenship is practical, can be further shown from the fact, that it may be uncertain whether a person is a citizen of one State or another. His State citizenship, and therefore his State allegiance, may be in controversy and would depend upon facts, of which his intention to change his domicile would be a prominent one. By such a change of domicile, he might become a citizen of the State into which he had emigrated, although enjoying there no single municipal privilege. But the uncertainty as to his State domicile would affect only his relation to the State. It would not affect his national domicile, nor impair, or in anywise alter his American citizenship, or the allegiance which he owes to the Union. These can be destroyed if at all, only by expatriation. The distinction can be also illustrated thus; while it may be quite doubtful in what town within a State, an individual may have his domicile, his citizenship in the State, and his allegiance to the State, by virtue of such citizenship, are not impaired by the doubt. These remain perfect, whether he is domiciled in one town or another. They can be destroyed only by acquiring another domicile by emigration to another State.

The doctrine contended for is plainly recognized in the civil

rights bill, which declares that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, shall be citizens of the United States. 14 *U. S. Statutes at large.* 27.

No discrimination is made, in this act, between States, territories, or districts. Nothing is required to constitute a person a citizen of the United States, but birth within their territorial limits. It may be perfectly uncertain, where, within those limits, may be his local domicile. The single fact to be proved, is birth within the United States. He may possess no municipal privilege in any State; he may be a citizen of no State, territory, or district; for he may have been born on land within a State ceded to the United States; birth within the United States is the sole condition of his American citizenship. Birth may, or may not determine his local domicile in one place or another — but his local domicile need not be determined, to bestow upon him his American citizenship; for that purpose, his domicile is national and not local.

The application of the principles which the plaintiff in error has had the honor thus to present to this Honorable Court is as follows:

The two qualities of citizenship, viz, that of a State, and that of the United States, have been recognized and acted upon by the legislative power, by the treaty making power, and by the judiciary, as distinct and separable in the same person. It therefore follows that shareholders in the National Banking Associations of the United States, so far as they are regarded *merely as shareholders*, are not, *in that capacity*, citizens of any State, are not domiciled in any State, and, *as such shareholders* owe no allegiance to any State. They are, *in their capacity of shareholders*, citizens of the United States only; their domicile is the whole country and not any State, territory, or district; *as such shareholders*, they owe allegiance to and are bound by the laws of the general government alone. They own their shares as property created by the

United States; they hold them as parts of the capital of corporations owing their existence solely to Congress. *As such shareholders* they are parts of a corporation under the exclusive jurisdiction of the general government; *as shareholders*, they select their agents, and manage the affairs of the corporations, without regard to any law of any State. If an officer of a bank defraud the corporation, he is punishable only under the laws of the United States, and commits no crime against the State in which his bank is located. All the rights, privileges, and liabilities of every shareholder, *as such*, are conferred, imposed, and regulated solely by the government which made it possible for him to be a shareholder. No State can prescribe, limit, or regulate the duties or rights of either the corporation or its members. The United States have the exclusive power of legislation over both the corporation and its members, and the exclusive power of legislation embraces and is in fact identical with exclusive jurisdiction. This power has very recently been exercised in relation to the sealing of scales, weights and balances, where the act of Congress, requires the directors of national banks, to have these implements sealed by the United States sealer of weights and measures, "which shall supersede the sealing of their scales weights and balances by any *State*, city or town sealer." So far then, as persons are shareholders in national banks, they are *in that capacity*, without and beyond the jurisdiction of any State, and the rule of law that personal property follows the domicile of the owner has no application to the power of a State to tax such shares, because, in his capacity of a shareholder, he is a citizen of the United States only, and his domicile is not a State, but the whole country.

To this position it may be replied, that the shares being personal property, the succession, when the holder dies, goes according to the law of the State in which he has his domicile, and not according to any law of the United States in that behalf. The conclusion thence drawn is, that the shares are under the

jurisdiction of the State, not only in regard to the succession, but for all purposes, because the decease of the owner cannot, of itself, make any alteration in the *situs* of the property.

But, 1st. The decease of the owner, introducing a different state of facts, can have no effect to alter the relation in which he stands to the general government while alive. Whatever may be the relation of his successors, by his decease, it cannot impair his own obligation and liability to the government under which and by force of whose laws he holds his property. What may happen after his decease, has no bearing upon his *status* before that event; so that the conclusion, drawn from the rule of succession, has, in truth, no application to the point under consideration.

2d. Although it be true, that the succession, to the shares of a deceased shareholder, would be by the laws of the owner's domicile, such succession is solely because the laws of the States, in that respect, are adopted as part of the laws of the United States; Congress having made no law of its own, regulating the descent and distribution of this species of property.

Congress has the same right to prescribe the mode, in which property of its own creation and under its exclusive jurisdiction and control, shall descend and be distributed after the owner's decease, as to prescribe how it shall be transferred during his life. Being its own creation, it has the power to declare that the shares shall be real estate and descend to heirs, and as it has declared, that the shares shall be personal property. It could declare that the shares shall be only life interests and revert to the government in whole or in part on the decease of the owner. *Story on the Conflict of Laws, ss.* 389–90. Massachusetts has exercised the same kind of power here contended for, in first enacting, that "pews in all houses of public worship excepting in the City of Boston, shall be real estate," *Rev. Stats. chap.* 60, *s.* 31, and afterwards enacting, that "pews shall be personal estate. But this provision shall not affect any existing

right of dower." *Gen. Stats. chap.* 30, *s.* 38. Thus, in the first instance, making the same property personal in one location and real in all others: in the second instance, personal in all localities, but giving or preserving dower in personalty. The power of prescribing the succession of personal property, has been exercised many times by the United States, of which one instance, serving to exemplify the whole, may be found in 9 *U. S. Stats. at large, chap.* 104, *sec.* 5, by which the extra pay due to a deceased soldier, at the time of his death, goes 1st to his widow, 2d to his children, 3d to his parents, and 4th to his brothers and sisters; contrary to the rules of succession prevailing in most of the States.

But Congress has prescribed no rule for the succession of shares in the national banking associations. It necessarily follows, that the succession must be according to the laws of the States where the owners had their domicile at the time of their decease; not because these laws have *proprio vigore*, any force to prescribe or regulate the succession, but because they are tacitly adopted by the United States, as *pro hac vice*, their own laws in that respect, in the same way as the practice acts of a State are expressly adopted in some particulars as the rule of the United States courts; or as the laws of the several States, in force at the time of its enactment, were expressly adopted by the Act of March 3, 1825, s. 3 (4 *U. S. Statutes at large*, 115), for the punishment of certain crimes. And this doctrine accords with the rule as expounded in *Doe* vs. *Vardell*, 5 *B. & C.*, 438, where the Chief Justice says "Personal property has no locality, and even with respect to that it is not correct to say that the law of England gives way to the law of a foreign country; but that it is part of the law of England, that personal property should be distributed according to the *jus domicilii*." By the same principle, it is a part of the laws of the United States, that personal property, created by acts of Congress shall descend and be distributed according to

the laws of the State in which the owner has his domicile when he dies, in the absence of any provision to the contrary, enacted by Congress.

It is contended further, that the shareholders in a national bank, *considered in that capacity alone*, are not persons taxable by a State, so far as their shares in such a bank are concerned, because the shareholders, *as such*, are parts of the means and instruments for carrying on the operations of the government.

The rights and obligations of every shareholder are exactly defined in the act. The act operates not only on *the corporations*, but also, directly on the shareholders as constituent parts of the corporations. It directs how individuals are to become shareholders, not only in the creation of a new bank, but in the conversion of a State bank into a national bank. They are treated throughout the act, as constituent parts of the corporations, and they must be such, for, if there were no shareholders, there could be no corporations. As such parts of the corporation, they must be parts of the means and instruments for carrying on the operations of the government, according to the principles enunciated in *Dobbins* vs. *the Commissioners of Erie County, ubi sup.*

There this Court says:

"The commanders of revenue cutters are declared to be officers of the customs, and they have large powers and authority." "All of this is legislation by Congress to execute sovereign powers. They are the means necessary to an allowed end." "Is the officer, *as such*, less a means to carry into effect these great objects, than the vessel which he commands, the instruments which are used to navigate her, or than the guns put on board to enforce obedience to the laws? These inanimate objects, it is admitted, cannot be taxed by a State, because they are means. Is not the officer more so, who gives use and efficacy to the whole?"

Applying this doctrine to the national banks, the shareholders who form the corporation and who give use and efficiency to it, are as much the means, as the corporation which depends upon

the shareholders for its existence. The corporation, it is admitted, cannot be taxed. The property of the corporation cannot be taxed. How then can the parts of the corporation, viz, the shareholders *in their capacity of shareholders*, or the parts of the corporate property, viz, the shares into which that property is divided, be taxed by virtue of State sovereignty which has no jurisdiction over either?

The conclusion from the argument thus far, is, that the States have not and cannot have any original right, by virtue of their sovereignty, to tax either the shares of the national banks or the holders of such shares *in their capacity of shareholders*. That power is exclusive in the United States. The right, possessed by the States, to impose such a tax, is derived, solely and absolutely, from the permission or grant of the United States. That permission or grant is contained only in the first proviso of the currency act. The proviso is, therefore, a public grant, made by Congress to the States, *ex mero motu*, without contract or consideration of any kind. It authorizes, but does not require the States to tax property which is in no respect under either their jurisdiction or control.

The argument upon this point has been thus extended, because the construction of the word "*place*" used in the proviso, depends, in a great measure upon the character to be assigned to it. The decision of the Court below is founded upon the position, that the States have the original right of taxing the shares of the national banks and that Congress has only the power to restrict this original right, by constitutional limitations, of which, that as to place is not one. If however, as it is respectfully submitted, this position of the Court below is proved to be erroneous, and the proviso is, or contains the grant of a new power, not before existing in States, then the next position of the plaintiff in error follows as a matter of course; viz,

II.

Congress has the constitutional power to annex to its grant to the States of a right to tax the shares of national banks, any conditions, limitations, or restrictions, which in their judgment may be deemed expedient, and the States are bound to comply with any and all such conditions, limitations, and restrictions, if they undertake to exercise the power thus conferred.

The only question which seems possible to arise in this connection, is, how far the character of the grantees, as sovereign States, may modify or affect the operation of the limitations annexed to the grant. Upon this point, it is respectfully insisted, that, in its capacity of grantee, a State has no sovereignty. Its right to tax property, exclusively within the jurisdiction of the United States, is not, and cannot be measured by its sovereignty in other respects. When a State becomes a corporator in a bank, even of its own creation, "it lays down its sovereignty as far as respects the transactions of the corporation." This it does, whether it is only one corporator among many, or owns the entire capital of the bank.

Bank of the United States vs. *Planter's Bank.* 9 *Wh.* 904.
Bank of the Commonwealth of Kentucky vs. *Wister.* 2 *Pet.* 318.
Briscoe vs. *The Bank of the Commonwealth of Kentucky.* 11 *Pet.* 257–324.

As a corporator, a State may be sued either in the United States Courts, or before its own tribunals. In such capacity, its character as a sovereign State is neither acknowledged nor recognized. It is viewed merely as a corporation or part of a corporation. In such capacity it is subject to all the limitations of the charter, and "has no more power than any other stockholder to the same extent." *Id.* Thence it would seem to follow that, if a State, having created a corporation by a charter, to which

it has annexed limitations, is bound by them, although it may be the sole corporator and, as such, the owner of the whole capital, it would be equally bound by the limitations annexed to the grant of powers made to it by a separate government. In both cases the State is a mere grantee, and, so far as regards the subject of the grant, has only the precise power granted, and is bound by all the limitations annexed to it. A State it is true, is competent to receive grants which an individual or a corporation is not competent to receive, of which that in the present case is an example. But then, it is submitted, that, upon the principles of the cases cited above, the character of the grant can alter neither the *status* nor the obligation of the grantee. It is still a grantee, and is bound to observe the limitations as much as any other grantee.

But it is unnecessary that this proposition should be maintained to its full extent. There are only three limitations imposed by Congress in the proviso, each of which has been sustained by various Courts before which the question has arisen.

1*st*. In *Van Allan* vs. *The Assessors*, the only question which this Hon. Court was called upon judicially to decide, was, whether the New York statute conformed to the limitation as to the *rate* of taxation. It was unanimously held that the decree of the Court of Appeals must be reversed, on the ground that "the enabling act of the State does *not conform to the limitations prescribed by the forty-first section of the act of Congress, passed June* 3, 1864, organizing the national banks and providing for their taxation." p. 581. Although the language is general, and applies to all the limitations, yet the question as to place and manner of taxation did not arise.

2*d*. *In Markoe* vs. *Hartranft, Am. Law Register of June* 1867, *p.* 487, decided in Pennsylvania, the exact question before the Court was, whether a State law, directing the cashiers of all banks, national or State, to collect annually, from every

stockholder, a tax of one per cent on the par value of the stock held by him, and pay the same into the State treasury, conformed, in the *mode of taxation* to the requirements of the national bank act. The Court say:

"The nature of the taxable interest in the shares bears directly upon the mode of taxation provided by Congress. As thus understood, the first proviso will read thus: 'that nothing in the act shall prevent the individual personal interest of the shareholder in his shares from being included in the valuation of the personal property of such person in the assessment of taxes imposed by or under State authority.' *We cannot reject these words,—'from being included in the valuation of the personal property of such person.'* Congress meant something by this language. It did not say that nothing shall prevent such shares from being taxed by or under State authority. That would have left the mode of exercising the authority to the States. But the operative words are, 'nothing shall prevent them from being included in the *valuation* of the personal property of the person holding the shares.' *Here is a defined mode authorized, and this and no other can be pursued.* The State must, therefore, proceed by direct taxation upon the shareholder, by including his stock in the valuation of his other personal estate."

3*d*. Even the Court below, in the case at bar, did not venture directly to assert, that the limitation in the proviso as to the place of taxation, was not as obligatory upon the State as either of the other limitations. They decided only that *place*, as used in the proviso, did not mean the city, town, or village in which the bank was located, but intended only the State in which it was located. The Court below were compelled to adopt one or the other of these two constructions. It cannot be denied that Congress, in using the phrase "*place where the bank is located*," meant something. It must have intended, either the specific city, town, or village, or the State, territory, or district of its location. No other sensible meaning can be assigned to the word. Having decided that it did not mean city, town, or village, it followed that it did mean State, territory, or district,

otherwise the limitation must have been held void, and thus a plain provision of the currency act nullified, against its clear words and the decisions of all the Courts which have had the act before them for judicial construction.

This decision was subsequently affirmed by the Court below in the case of *Flint* vs. *The Aldermen of Boston*, not yet reported, where it was held that the plaintiff, a resident of Boston, could not be taxed in Massachusetts, for the shares owned by him in a national bank located in New York.

Thus, then, the Supreme Court of Massachusetts have substantially decided, that the limitation as to *place*, is binding on the State. Other cases in the State Courts have also in effect decided that the taxation of the shares of these banks must be in conformity to all the limitations of the proviso. e. g.

N. H. *First National Bank of Portsmouth* vs. *Portsmouth*, 47 *N. H. R.*

ID. *Huntington* vs. *Burt. Id.*

OHIO. *Frazer* vs. *Siebern*, *Am. Law Reg. for June* 1867, 475.

INDIANA. *Wright* vs. *Stiltz.* 27 *Indiana Rep.* 338.

MAINE. *Opinion of the Justices*, 53 *Maine R.* 594–96.

ID. *Abbot* vs. *Bangor*, 54 *Id.* 540.

The question, therefore, before this Hon. Court, is not whether the limitation as to place is such as Congress has the right to annex to its grant of power to the States to tax the shares of national banks, which the Court below, in their opinion, several times deny; but whether their construction of the word "*place*," in the phrase, "*place where such bank is located*," is correct.

The plaintiff in error, admitting a. g. that the meaning of the word is doubtful, which he denies, maintains in opposition to the Court below, that

III.

The phrase, used in the first proviso of the 41st section of the currency act, viz, "place at which such bank is located and not elsewhere," was intended, by Congress, to mean the specific *city, town,* or *village* in which a bank is located. It was not intended to mean, nor can it be so construed as to mean the *State, territory,* or *district* in which it is located.

Because,

I. Wherever in any section of the act, other than the 41st the word "*place,*" occurs, it means clearly and distinctly, in all instances but one, either a city, town, or village. In the excepted instance, it means a banking house. Nowhere does it mean, nor can it be made to mean, a State, territory, or district.

The word "place" or "*places*" occurs in the act seventeen times referring to location; viz, once in the 41st section, where the question as to the construction arises; fourteen times prior, and twice subsequent to that section.

1st. SECTION II.

"Every certificate, assignment, and conveyance executed by the comptroller, in pursuance of any authority conferred on him by law, and sealed with his seal of office, shall be received in evidence in all *places and courts* whatsoever;"

Places must necessarily here signify localities more restricted than States, territories, or districts, because there are places not within any such political division of the United States. So there are also many towns, in every State, in which no court is held. The word *place,* therefore, includes, every possible situation in which such a certificate can be needed as evidence. The two words "*places*" and "*courts,*" seem to have been inadvertently transposed, and were probably here intended to convey the same idea as in section VI.

2d. SECTION VI.

The persons wishing to form a Banking association shall under their hands make an organization certificate which shall specify;

First, the name etc.

Second. "The *place* where its operations of discount and deposit are to be carried on, designating the State, territory, or district, and also the particular county and city, town, or village."

"*Place*" is here used in contrast with *State, territory, or district.* To specify merely the latter, would not inform the comptroller where the operations named are carried on. He could not communicate with any institution, if unable to direct his letters to its *place of location.* In other words, this section requires the organization certificate to specify in what county and city, town, or village, that is to say, in what *place within* a State, territory, or district, the business is transacted.

3d. SECTION VI. *Clause* 4.

The certificate must specify —

"The names and *places of residence* of the shareholders, and the number of shares held by each of them."

"*Places of residence*" clearly cannot here mean States, territories, or districts of residence. The phrase may intend the street and number of the house in which a shareholder resides, but it must also intend the city, town, or village of his residence.

4th. SECTION VI. *Clause* 5.

"Copies of such certificate, duly certified by the comptroller and authenticated by his seal of office, shall be legal and sufficient evidence in all *courts and places* within the United States, or the jurisdiction of the government thereof," etc.

Congress here prescribes, as in the second section, a rule of evidence in regard to the certificates. Therefore it specifies courts, where such rules are more usually considered. To have specified only courts, might leave it doubtful, whether the certificates would be evidence elsewhere than in a court, or whether the rule were not merely technical. That doubt is removed by adding, that the certificates shall be evidence in all *places* as well as in all *courts;* that is to say, in all courts *and other places.* The connection of the two words shows that by *places* is intended localities much more restricted in extent, than States, territories, or districts.

5th. SECTION VII; *Proviso.*

This section first enacts, that no association shall be organized under this act with a less capital than $100,000, nor in a city, whose population exceeds fifty thousand persons, with a less capital than $200,000; and then adds;

"*Provided*, that banks with a capital of not less than $50,000, may; with the approbation of the Secretary of the Treasury, be organized in any *place* the population of which does not exceed six thousand inhabitants."

Place cannot here mean *State,* because no State has a population of less than six thousand inhabitants. The provision evidently intends that a bank may be organized in a *city* with a certain population, but not in any *place,* whether city, town, or village, with a population less than six thousand persons, unless the Secretary of the treasury first approves such location. The phrase, "*city whose population exceeds fifty thousand persons,*" is brought into such connection with the phrase "*place the population of which does not exceed six thousand inhabitants,*" as to amount, it is respectfully submitted, to a legislative declaration that the word "*place,*" as there and previously used, is intended to signify city, town, or village, and not State, territory, or district.

6th. SECTION VIII; *at the end.*

"its usual business shall be transacted at an office or banking house located in the *place* specified in its organization certificate."

If *place* were here intended to mean State, territory, or district, then a bank might be located in one part of a State, and its office or banking house in any other part of it. This would be a sufficient literal compliance with the eighth section, because the office would, in that case, be located in the *place*, that is, in the State specified in the certificate. But the particular city, town, or village, must be specified, and the office or banking house must be located in that *place*. This proves that *place* means a situation more specific than State, territory, or district. It is, moreover, a legislative construction of *place* as used in the second clause of the sixth section.

7th. SECTION XVII.

"—the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and *place of residence* of each of the directors of such association," etc.

To this use of the word place, the same remarks are applicable, which have been made in regard to the same phraseology, found in clause fourth of section VI.

8th. SECTION XXIII.

"After any such association shall have caused its promise to pay such notes on demand to be signed by the President or Vice-president and cashier thereof, in such manner as to make them obligatory promissory notes, payable on demand, at its *place of business*, such association is hereby authorized to issue and circulate the same as money."

Place of business is here obviously used as synonymous with *office or banking house*, the phrase used in section VIII. It cannot mean State, territory, or district of business.

9th & 10th. SECTION XXX; *at the end.*

"The purchase, discount, or sale of a *bona fide* bill of exchange, payable at another *place*, than the *place* of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

By universal mercantile usage, bills of exchange are made payable at some definite locality within a State, territory, or district; often at some prescribed bank within a specified city, town, or village. Bills of exchange can never be said to be payable at States, but at places within States. Therefore *place*, as twice used in this section, can mean only city, town, village, or banking house.

11th, 12th, & 13th. SECTION XXXIV; *in the middle.*

"The comptroller shall publish abstracts of such reports in a newspaper to be designated by him for that purpose in the city of Washington, and the separate report of such institution shall be published in a newspaper in the *place* where such association is established, or if there be no newspaper at such *place*, then in a newspaper published at the nearest *place* thereto," etc.

If, in these instances, by "*place*," is intended State, territory, or district, then the report of each institution may be published in a newspaper printed in any part of the State, because to publish it in the *State* where the bank is located, would be to publish it in the *place* where it is located. Thus, for example, all the reports of the Boston banks, might, under such construction, be printed in a newspaper published in the extreme western part of Massachusetts. Such a proceeding would defeat the object of the publication, which is the information of the stockholders, who are presumed to reside chiefly in the neighborhood of the bank. This construction would, moreover, impute to Congress the supposition, that there might be at least one State of the Union which did not possess a newspaper; an imputation on Congress "not fit to be made." Again, the comptroller is to publish his

abstract in a newspaper printed in the *city of Washington*, and each bank is to publish its report in a newspaper printed at the *place* where it is established. The phrase "*city of Washington*," therefore, defines the phrase, "*place where such association is established.*" "*City*" and "*place*" are localities *ejusdem generis;* that is, *place* signifies city, town, or village, and not State, territory, or district.

14th. SECTION XXXIV; *last lines.*

"Associations in other *places* than those *cities* named in the thirty-first section of this act shall also return the amount due them available for the redemption of their circulation."

The thirty-first section specifies seventeen cities. The thirty-fourth section speaks of "*other places than*" those seventeen cities; thus designating a city as a place. The word city is, therefore, here used as forming a part of a class. *Places* are the class, and *cities* the part specified. Associations existing in other *places* than certain named cities, must necessarily mean, associations existing in cities not named, or in other similar places, that is in towns or villages. To construe the word "*places*," as used in this section, to intend States, territories, or districts, would cause it to read associations in other States, territories, or districts, than those cities named in the thirty-first section, and thus under the provision mere nonsense.

The foregoing are all the instances where the word occurs prior to the forty-first section.

15th. SECTION XLI; 1*st. Proviso.*

16th and 17th. SECTION XLVI.

The thirty-second section provides, that every association, not organized in one of the seventeen specified cities, shall select an association in one or other of those seventeen cities, in which to redeem their notes.

SECTION XLVI. provides that

"If any such association shall at any time fail to redeem, in the lawful money of the United States, any of its circulating notes, when payment thereof shall be lawfully demanded, during the usual hours of business, at the office of such association, or at its *place of redemption* aforesaid, the holder may cause the same to be protested, in one package"—"unless the president or cashier of the association whose notes are presented for payment, or the president or cashier of the association at the *place at which they are redeemable*, shall offer to waive demand," etc.

It is evident, that, in this section, "*place*" means neither State, territory, or district, nor city, town, or village, but *office or banking house* where the notes are redeemable. This is the excepted instance.

From this examination of the statute, it appears that in sixteen, out of seventeen times, where the word "*place*" occurs in the statute, it was invariably intended by Congress, to signify city, town, village, or banking house, and never State, territory, or district.

The question then is, what does the same word signify in the only remaining instance of its use: viz, in the forty-first section?

It is respectfully submitted, that the same and no other meaning must be there attached to it. The word "*place*," in the phrase "*place where such bank is located*," found in the first proviso, signifies city, town, or village, and does not, as erroneously decided by the Court below, signify the State where the bank is located. The statute itself has defined the meaning of the word.

II. The well understood rule in the construction of statutes, is, that every part must be examined and the intention extracted from the whole.

"The best expositors of all acts of Parliaments, in all cases, are the acts of Parliaments themselves, by construction and conferring all the

parts of them together; *optima statuti interpretatrix est (omnibus particulis ejusdem inspectis) ipsum statutum.*"

Bonham's case, 8 *Rep.* 117.
Pennington vs. *Coxe,* 2 *Cr.* 33.
United States vs. *Fisher, et al, Id.* 358.
Van Allan vs. *The Assessors, ubi sup.*

Having, by such examination, discovered the meaning of particular words or phrases used in the statute, the same meaning is to be attached to them throughout the whole enactment. They must be taken to have been used in the same sense every where in the same statute.

"We disclaim altogether the assumption of any right to give different meanings to the same words in an act of Parliament, on the ground of a *supposed* general intention in the act. We think it necessary to give a fair and reasonable construction to the language used by the legislature, but we are not to assume the unwarrantable liberty of varying that construction for the purpose of making the act consistent with any views of our own."

Per Lord Denman C. J. in *Regina* vs. *Commissioners of Poor Laws Holburn Union.* 6 *Ad & E.* 56, 68–9.

And this course, thus pointedly condemned in the case cited, and in many others, it is respectfully submitted, the Court below have professedly adopted in their construction of the word place.

See also:

Rex vs. *Stoke,* 7 *B. & C.* 69.
Rex vs. *Ramsgate,* 6 *Id.* 712.
Rex vs. *Inhabitants of Great Bentley,* 10 *Id.* 526–7.
Samuel vs. *Nettleship,* 3 *Q. B. R.* 188.

III. This Hon. Court adopted and acted upon the principle contended for, in *Van Allan* vs. *The Assessors,* when determining the meaning of the word "*shares*" used in the currency act. It was argued at the bar, that this word, found in the 41st section,

meant only the interest of the shareholders as representing the portion of the capital, if any, not invested in the bonds of the government. The Court examined the meaning of the word "*shares*" and "*shareholders*" occurring in various other parts of the act, and concluded, that, in all instances of its occurrence, the word "*shares*" included the whole interest of the *shareholders* and then said,

"It would be singular if, in the use of the term in connection of State taxation Congress intended a totally different meaning without any indication of such intent." p. 588. "If Congress had intended any such discrimination, it would have been an easy matter to have said so. Certainly so great and important a change in the use of this term, if so intended, would not have been left to judicial construction." *Id.*

This reasoning so exactly applies to the question now before the Court, that to enlarge upon it would be only to weaken its force.

IV. The words of a statute are to be taken on their *ordinary and familiar signification and import* and regard is to be had to their general and popular use; "*loquendum est ut vulgus.*"

"The legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context."

Per Story J. Lessee of Levy et al. vs. *M'Cartee,* 6 *Pet.* 110.

"We entirely disdain any right to give to the words of the legislature a meaning different from their natural import, in order to make them accord with some latent intention that may be *supposed* to have existed. In acts of general bearing, like these, it is absolutely necessary to construe words according to their obvious meaning, and not to take the unwarrantable liberty of attributing a sense to plain words different from their natural import."

Per *Coleridge J. in Regina* vs. *The Poor Law Commissioners,* 3 *Neville & Perry,* 77–83.

Rex vs. *The Poor Commissioners,* 1 *Id.* 371–5.

That the meaning of the "*place*" contended for by the plaintiff in error, is its natural, ordinary and familiar signification, can hardly be denied. Place is defined in Worcester's dictionary thus: *a particular portion of space — a locality — station—situation—position—post—site—spot.*"

Locate, by the same authority, signifies, "*to place—to set, fix or establish in a place.*"

If a person were asked from what *place* he came, the *jus et norma loquendi,* would require him to specify the city, town or village, as well as the State, territory, district or country of his residence. The currency act provides that the associations shall designate the *places* where the stockholders reside. To name only the States, territories, or districts of their residence, would not comply with this requirement. The common interrogatory, propounded to all deponents, "What is your *place* of residence and *place* of business," is always answered by specifying the city, town or village, and never by merely naming the State, territory or district. So in the bankrupt act of 1867, *Sec.* 1, it is provided, that "said Courts may sit for the transaction of business in bankruptcy at any *place* in the district, of which *place* and the time of holding Court they shall have given notice as well as at the *place* designated by law for holding such Courts." And again, in *Sec.* 11, the applicant for the benefit of the act is required to set forth "*his place of residence.*" The phrase therefore, "*place where such bank is located,*" is as definite an expression as the English language admits of, and is entirely too plain to require judicial construction. It can be rendered of doubtful import only by speculating upon the *supposed* general intent of Congress, against the clear meaning of the words; a course pointedly condemned in all the cases cited and in many others.

IV.

An examination of other sections of the currency act, will confirm the correctness of the interpretation contended for by the plaintiff in error.

1st. Section X.

1*st.* "If from any cause an election of directors shall not be made at the time appointed, the association shall not for that cause be dissolved, but an election may be held on any subsequent day, thirty days notice thereof in all cases having been given in a newspaper published in the *city*, *town* or *county* in *which the association is located;* and if no newspaper is published in *such city*, *town* or *county*, such notice shall be published in a newspaper published nearest thereto."

The 41st section uses the phrase "*place where such bank is located.*" The organization certificate is required to specify the *place* where its operations of discount and deposit are to be carried on designating the State, territory or district, and also the particular county and city, town, or village. Thence it is evident that the phrase "*city, town, or county in which the association is located,*" used in the tenth section, is synonymous with that used in the 41st section. This view is confirmed by the provision of the tenth section as to where a notification of great importance to the stockholders shall be published; viz, in the city, town, or county of its location.

The same remarks are applicable to the three following sections, viz.

2d. Section XV.

This section requires notice of the sale of the stock of delinquent shareholders to be given,

"in a newspaper published and of general circulation in the *city* or county *where the association is located.*"

3d. Section XVIII.

The section requires the comptroller's

"certificate to be published in some newspaper published in the *city* or *county where such association is located.*"

4th. SECTION XXXII.

This section mentions, three times, associations organized in or within any of the seventeen cities named in the thirty-first section.

It is therefore respectfully submitted, that the language of these four sections are legislative declarations as to the meaning of the phrase in question, as used in the forty-first section.

The construction contended for is fortified by the striking fact, that

II. Whenever the regulations, concerning the operations of a bank, require a larger extent of territory to be intended than a county, city, town, or village, the language of the act is changed. The word "*place*" *is then dropped*, and a word of broader meaning used instead of it.

1st. SECTION IX.

"Every director shall, during his whole term of service, be a citizen of the United States; and at least three-fourths of the directors shall have resided in *the State, territory or district in which such association is located* one year next preceding their election as directors, and be residents of the same during their continuance in office."

To have required that all the directors should reside in the place, i. e. in the county and city, town or village, where the bank is located, would obstruct its beneficial management. Therefore the phrase "*place where such bank is located*" is changed. The word "*place*" is dropped and the directors are required to reside in the *State, territory, or district*, and are not confined to the *place* where the bank is located. By this change of language it follows, that one-fourth of the directors may reside in other States, territories, or districts, than that in which a bank is located. As the same section requires that each director shall own at least ten shares in his bank, in his own right, the act recognizes the fact that a bank in one State, may have stockholders residing in another State, some of whom can be direc-

tors. Dropping, in this connection, the word "*place*," and substituting for it, State, territory, or district, has, therefore, a marked significance. It shows that the change of words was made for the purpose of enabling some of the directors of a bank to reside elsewhere than in its "*place*" of location.

2d. Section XXX.

"Every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest allowed by the laws of *the State* or *territory* where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized in any such State under this act."

The language is here changed in a very significant and accurate manner. When the act provides for the election of directors, it uses the words State, territory, or district, because stockholders may reside either in a State or in a territory, or in a district. But when, as in this section, it provides for the rate of interest which a bank may charge, it drops not only the words "*place*," but also the word "*district*," using the words "*State or territory;*" because rates of interest are established by the laws of some State or territory, and not by the laws of any place or district. But if *place of location* and *State of location* were intended to mean the same thing, the change of language was needless. For interest allowed *by the laws of the place*, where the bank is located, would then be as appropriate as interest allowed *by the laws of the State or territory* where the bank is located. It is, therefore, clear that the change was designed, and that *place* of location can intend only city, town, or village.

3d. Section LVII.

"Suits, actions, and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States within the district in which such association may be established;

or in any State, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases; *Provided, however*, that all proceedings to enjoin the comptroller under this act, shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located."

This section brings together and recognizes the distinctions insisted upon. It uses three phrases:

1*st*. "District in which such association may be established."

2*d*. "County or city in which said association is located."

3*d*. "District in which the association is located."

The first and third of these phrases are synonymous. Nowhere in this section is found either the phrase "*State in which the bank is located*, or "*place where such bank is located*."

The first clause provides for suits in the United States Courts. As suits in these courts can be brought only in the judicial district where the defendant resides or is found, appropriate language is used when providing for suits against national banks, viz, "suits, etc. against any associations may be had in any circuit, district, or territorial court of the United States within the *district* in which such association may be established." When, however, the section refers to suits against banks in State courts, the language is changed. It then reads "or in any State, county or municipal court in the *county* or *city* in which said association is located," because State courts are organized only in reference to counties, cities, towns, or other divisions of the State, and not in reference to the judicial districts of the United States. But when the section relates to injunctions upon the comptroller, it returns to the language employed in the beginning of the section, and requires such suits to be brought in a circuit, district, or territorial court of the United States, held in the *district* in which the association is located.

It is respectfully suggested that the intention of this section is, that no bank shall be sued in any State court, except one held in its "*place*," that is to say, in the county, city, or town of its loca-

tion. This intention is manifested from the omission of the phrase frequently used for other purposes, "*State where the association is located.*" The omission shows that the language of the act, at least in these particulars, was carefully considered.

4th. SECTION XLI.

By this section the States are authorized to impose taxes on a bank, "*at the place where such bank is located and not elsewhere.*" But when the *rate* is restricted, the words are changed, viz:

"*Provided*, that the tax so imposed under the laws of any *State*" — "shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the *State* where such association is located."

If Congress, by these words, "place where such bank is located," intended the same thing as "State where such association is located," the change was needless. But the change was made with an obvious purpose, and was intended to convey a different idea; for taxes are imposed by *State authority* in *places* under its jurisdiction.

V.

If this Hon. Court, in considering the purpose and intent of the whole currency act, should be yet in doubt as to the meaning of the phrase in question, then it is respectfully insisted, that the rule, as to the construction of public grants, should be applied in support of that contended for by the plaintiff in error, viz:

"When two equally plausible constructions can be given to the same words of a grant, and no other motive intervenes, that construction is to be adopted which *restricts* the grant, in preference to that which *extends* it."

Ohio Life Insurance and Trust Co. vs. *Debolt*, 16 *How.* 416–35.

Charles River Bridge vs. *Warren Bridge*, 11 *Pet.* 420–545.

United States vs. *Arredondo*, 6 *Pet.* 737–40.
Mills vs. *St. Clair County*, 8 *How.* 569.
Martin vs. *Waddell*, 16 *Pet.* 367–411.
Lessee of Nagle vs. *Ahern*, 3 *Irish Law Rep.* 41.
Sewall vs. *Jones*, 9 *Pick.* 414.
Freeland vs. *Hastings*, 14 *Allen*, 575.

That the proviso is a grant to the States, has been established. The United States being the grantors, it necessarily follows that it is a public grant. That the grantees are sovereign States, has been proved to make no difference in their rights and obligations as grantees. It is equally clear, as already intimated, that this public grant is founded on no obligation either express or implied on the Federal government, to make it; that it proceeds from the mere bounty of Congress, without consideration or contract of any kind, except, perhaps, the agreement of the States which accept the grant, to be bound by the limitations attached to it; and that it extends to property as entirely beyond the jurisdiction of the States as our newly acquired territory at the north pole. To the construction of all such grants, it is respectfully insisted, that the well known rule, above cited, invariably applies, whoever may be the grantees; unless the grant be thereby made void or unavailable. Such result, however, cannot be predicated of the application of the rule to the case at bar, because, if the act of Massachusetts had conformed to this limitation as it conformed to the other two limitations in the same proviso, its revenue, from such taxation, would still have been available, though not to so large an extent as it desired. The specific application of this rule as to the construction of statutes imposing burdens or duties on the subject, is recognized in the following cases, amongst many others:

Sewall vs. *Jones*. 9 *Pick.* 414.
Cleaveland vs. *Hastings*. 6 *Cushing*. 380–83.
Lessee of Nagle vs. *Ahern*. 3 *Irish L. R.* 41.

The result of the argument, which the plaintiff in error has had the honor thus far, to present to this Honorable Court, is the following:

Congress, by the first proviso of the forty-first section of the currency act, granted to the States the power of taxing property beyond their jurisdiction.

This grant was not the limitation of a power already existing in the States, but a genuine grant, without which, this property could not be taxed by the States.

Three limitations, restrictions, or conditions are annexed to the grant, the second of which is, that the shares of national banks shall be included in the valuation of the personal property of the owner, for the assessment of taxes imposed by or under State authority, "*at the place where such bank is located and not elsewhere.*"

The language of this limitation, restriction, or condition is too plain to require judicial construction.

An examination of the whole statute demonstrates the meaning of the word "*place,*" used in this phrase and elsewhere, to be the city, town or village, and not, as the Court below erroneously decide, the State, territory or district where the bank is located.

The legislature of Massachusetts, in attempting to exercise the power thus conferred, disregarded the limitation as to *place,* by enacting that the valuation for the assessment of taxes imposed by its authority, should be made, *not* in the place where the bank is located, but *elsewhere,* viz, in the towns where the shareholders reside.

According, therefore to the decision in *Van Allan* vs. *The Assessors,* where the Court were unanimous, the statute of Massachusetts is void, because it is repugnant to an act of Congress made in pursuance of the Constitution, and also because it is repugnant to the policy of the proviso, which was to favor the locality in and from which the business of the bank might be

conducted. If any State cannot or does not conform to this mode of taxation, such State will lose the benefit of the grant. This local taxation being, as it is respectfully insisted, matter of substance, which cannot be disregarded.

If therefore the decision of the Court below sustaining the statute, is erroneous upon the positions heretofore presented, or upon either of them, the judgment should be reversed, so that the plaintiff in error may have a trial of his rights without prejudice from any influence which an erroneous construction of an act of Congress may be presumed to have had upon the mind of the Court.

The construction contended for by the plaintiff in error is supported by the amendment of the Currency Act, U. S. Stat. 1868, Feb'y. 10, passed after this case was decided in the Court below, where it is provided that,—

"The words 'place where the bank is located and not elsewhere,' in section 41 of the act to provide for a national currency, approved June 3d, 1864, shall be construed and held to mean the State within which the bank is located, and the legislature of each State may determine and direct the manner and place of taxing all the shares of national banks located within said States, subject to the restriction that the taxation shall not be at greater rates than is assessed upon the moneyed capital in the hands of individual citizens of such State, and providing always that the shares of any national bank owned by non-residents of any State shall be taxed in the city and town where such bank is located and not elsewhere."

This act, it is respectfully suggested, is a distinct recognition that the construction contended for by the plaintiff in error is correct.

It is, moreover, supported by three decisions of two eminent tribunals, upon the exact point, which this Court cannot fail to regard with great respect.

In an opinion, given by the Supreme Court of Maine, to the legislature of the State; the Court say:

"When the owner of shares resides at a place other than that where the bank is located, it is obvious that if the valuation of shares and as-

sessment upon the same were made at the residence of the shareholder, *it would be done in the very teeth of the act which in express terms prohibits their being done elsewhere.*"

53 *Maine Rep.* 594–96.

In Abbott vs. *Bangor*, 54 *Maine Rep.* 540. The plaintiff was an inhabitant of Castine and owned shares in a national bank located in Bangor.

The Court held that these shares could not be taxed in Castine, because the United States currency act permitted the taxation only in the place where the bank was located, *i. e.* Bangor. They could not be taxed in Bangor, because the State law had conferred on the assessors no authority to tax them there. They were therefore held exempt from all taxation.

In Huntington vs. *Burt*, 47 *N. H. R.* the Court decided that the plaintiff, a resident of *Walpole*, could not be taxed in that town for stock owned by him in a national bank located in *Keene*, because such taxation was not permitted by Congress. To uphold the decision of the Court below in the case at bar, will, therefore, be, in effect, to reverse the decisions of the Courts of Maine and New Hampshire on the same points.

VI.

It was objected, in the Court below, to the construction contended for by the plaintiff in error, and the objection may be insisted upon in this Hon. Court:

1. That the plaintiff in error cannot complain of the taxation of his shares, because the tax was imposed in accordance with the limitation as to place. He resided in Boston, and all the national banks, in which he owned shares and upon which he was taxed, were located in the same place. According, therefore, to his own construction of the phrase in question, he was rightfully taxed.

The Court below attached no importance to this objection,

but rested their decision on very different grounds. It is an obvious evasion of the point in issue; the common logical fallacy of *ignoratio elenchi*. The question is, whether the statute of Massachusetts, by force of which the shares of the plaintiff in error were thus taxed, conforms to or disregards the limitations of the proviso. If one of these limitations is disregarded, the statute is void, as repugnant to an act of Congress, and all taxes imposed under its provisions are illegal. This position is not overthrown by the *argumentum ad hominem*, that the plaintiff in error resided in the city where the banks are located. The statute is not proved to be valid, because at least one person would be rightfully taxed, had the limitation been regarded. The position of the defendants in error amounts only to this; that a statute may be valid in some parts and as to some persons, and invalid in other parts and as to other persons, and that, as to the plaintiff in error, it is valid, because he was taxed according to the limitation as to place.

The question arises upon the third section of the Massachusetts act. (*Appendix, p.* 89, 90.) Is this section valid as to the plaintiff in error and other persons, if there were any, situated as he was, or is it altogether void, because it disregards the limitation as to *place?*"

The doctrine of Massachusetts as to the validity of statutes under its own constitution is the following:

"It is also well settled that when part of a statute is unconstitutional, that will not authorize the Court to declare the remainder of the statute void, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected in meaning, that it cannot be presumed that the legislature would have passed one without the other." "The point is"—"whether they are essentially and inseparably connected in substance."

Commonwealth vs. *Hitching*, 5 *Gray*, 482–85.

This doctrine will commend itself to the approbation of this Court, not only from its intrinsic soundness, but also because of

the analogy between the construction of statutes in reference to their validity under a State constitution, and to their validity under an act of Congress. The laws of the United States stand, in many instances, in respect to those of a State on the same subject matter, in much the same relation as the constitution of a State. Where a law of a State is asserted to be repugnant to its constitution, Courts are extremely careful in its construction and strive to uphold it if possible.

Wellington et al. Petitioners etc. 16 *Pick.* 86–95.

The same care is taken by this Hon. Court in declaring the invalidity of a State law as repugnant to an act of Congress. In either case the State statute will be upheld, if possible, *consistently with established rules of interpretation.* In neither case will the clear intention of the Legislature be disregarded, merely to sustain the statute.

Under the first proviso of the forty-first section of the currency act, shareholders in national banks may be divided into three classes. 1st. Those who own shares in one or more banks, none of which are located in the place where the owner resides. This class are *altogether* exempted from State taxation for such shares. 2d. Those who own shares in one or more such banks, some of which are, and others of which are not located in the place where the owner resides. This class are *partially* exempted from State taxation for such shares. 3d. Those who own shares in one or more banks, all of which are located in the place where the owner resides. This class have no exemption from State taxation.

The Legislature of Massachusetts could easily have distinguished between these three classes, and confirmed the third section of the act to the limitation of the proviso. But no such distinction is made. The language of the section is general. It applies to all shareholders wherever their residence may be,

whether in the State or out of it, in palpable disregard of the limitation as to place.

If this section were capable of a double construction, so that one would conform to, and the other be repugnant to the limitation, this Court would adopt the former and reject the latter. Or, if notwithstanding the generality of the language, it could be properly restricted, in its application, to that class of shareholders only, who reside in the place where the banks, in which they owned shares, were located, the Court would thus restrict the application.

But the section is not capable of such double construction; nor can it be thus restricted. "The assessors of each city and town, in which *any* shareholder in such association resides, *shall* include *all shares* in such associations held by *persons resident and liable to taxation in said city or town*, in the valuation of the personal property, etc. *Appendix Sec.* 3.

These words do not apply merely to persons liable to taxation under the proviso for shares owned by them in national banks. They apply to all persons owning personal property of any kind, in any part of the State. The provision is only an enlargement of the powers of assessors conferred by previous laws. The tax act of Massachusetts requires that "all personal estate within or without this State, shall be assessed to the owner in the city or town where he is an inhabitant on the first day of May," *Gen. Stats. of Mass. c.* 11, § 12. The inhabitants are required to bring in lists of their estates both personal and real. *Id. Sec.* 22. The assessors must ascertain, as nearly as possible, the particulars of the personal estate etc. of every person who has not brought in such list, and make an estimate thereof at its just value. *Id. Sec.* 27.

The third section of the Massachusetts act, now under consideration, is imperative upon the assessors. *They shall* include in the valuation all the shares of the national banks wherever the owner resides. If the shareholders hand in their

lists, they *must* include all their national bank shares in such lists. No authority is conferred on the assessors, by the third, or any other section of the act, to discriminate between the three classes of shareholders; nor can the assessors make such discrimination, without disobeying the law. The distinction can be regarded only by inserting words, so that the section may read "shall include all shares in such associations held by persons resident and liable to taxation *for such shares*, in said city or town etc.," which would not be a construction of the law as it stands, but an act of legislation, opposed to the clear intent of the statute. The section contains but a single provision in respect to the taxation of shares. It cannot be divided into parts, so that one shall stand and the other fall. The supposition, therefore, that the legislature would not have passed one part of the section without passing the other, is obviously true; because the section has only one part. It is an indivisible whole, incapable of separation into parts. The three classes of shareholders are indiscriminately included in the enactment. The intent of the legislature was to tax all the shares owned by persons residing anywhere in the State. This is apparent, not only by the words of the section, but from the judicial exposition of it made by the Court below. Thence it follows, according to the opinion of the most eminent of the Massachusetts judges, that the whole section must stand or fall as it conforms to or is repugnant to the limitations of the proviso. But the section can be sustained only by adopting the construction given by the Court below to the word "*place*"; a construction which it is respectfully insisted, is clearly erroneous.

Moreover, no tax upon the shares of national banks can be imposed by a State, unless by State laws, specially passed, authorizing its imposition, and conforming to the limitations of the grant.

This is obviously true, because the currency act is not man-

datory, but permissive. It does not require, but only allows the shares to be taxed by the States. Having no original authority to tax the shares, and the authority conferred being limited in its extent, no existing State law could reach the case of this newly created property. Legislation was therefore needed to confer power on the officers authorized to assess taxes under State authority, to include the shares in the valuation and to regard the limitations imposed. As the act passed for this purpose by Massachusetts, does not conform to the limitation as to place, and is therefore void as repugnant to the act of Congress, there is no State legislation, under which assessing officers of the State can so include any shares. The accident, that the plaintiff in error happened to reside in the city where his banks were located, cannot confer an authority on the assessors of Boston to tax his shares, because that authority must be derived from a valid State act, which does not exist. An act might have been passed to meet such cases, but as it was not passed, the plaintiff in error and all other persons owning shares in national banks were illegally taxed under that law.

Whether the statute of Massachusetts imposing a tax can be sustained under its constitution, is a question exclusively for the State Court. In the case at bar the Court did not consider that question. The result of this omission is that the case should go back to the State Court, if its decision upon the act of Congress was erroneous, so that the parties may have the questions, which belong exclusively to the State Court, decided uninfluenced by an erroneous view of an act of Congress; for the plaintiff in error has a right to contest his liability to taxation under the constitution and laws of Massachusetts, with the benefit of the protection which may be afforded to him from a correct construction of the act of Congress which bears upon the question.

2d. It may be objected that the proviso is only directory. To this argument the reply is,

1. That affirmative words will render a statute imperative, if they are full, explicit and peremptory, and show that no discretion was attempted to be given.

"The words of the act are peremptory, 'that the forms of proceeding set forth in the schedule annexed *shall be used*' (not the usual words *shall and may*) 'on all occasions, with such additions or variations only as may be necessary to adapt them to the particular exigencies of the case.' I cannot therefore say, that these words are merely directory. Power is given to the magistrate to take away on certain conditions, a right which the public before enjoyed; and this is to be done in a certain prescribed form, with such additions or variations *only*, as the locality of the description may require. Now here there is a material variance in the order from the form prescribed; for it does not set forth the length and breadth of the new path set out in lieu of the old one."

Davison et al. vs. *Gill*, 1 *East.* 64.

2. If an affirmative statute introduces a new law and directs a thing to be done in a certain manner, it shall not be done in any other manner, although there are no negative words.

In the municipal corporation act, the words are "shall not publish later than two of the clock." A publication made after that hour was held to be void, although made for the sole purpose of correcting an error.

Regina vs. *The Mayor Leeds*, 11 *A & E*, 512.

3. Negative words in an affirmative statute render it imperative.

"It has been asked what language will render a statute imperative if the 54 Geo. III, c. 84 be not so? Negative words would have given it that effect but those used are in the affirmative only."

Rex vs. *Leicester*, 7 *B & C*, 12.

The words of the proviso are, "nothing in this act shall be construed to prevent all the shares, etc., from being included in the valuation, etc., in the assessment of taxes by or under

State authority at *the place where such bank is located* AND NOT ELSEWHERE." The negative words, "*and not elsewhere*," leave no doubt that the proviso must be construed as imperative, and not as directory, whatever meaning be assigned to the word *place*.

"Words and phrases will be held to be directory only when it is clear that the intent was to use them in such a sense, or when a different construction would be attended with unreasonable, absurd or incongruous results. *It certainly would be contrary to the ordinary rule of interpretation to say that a grant of power to which qualifying and restrictive words are annexed*, is nevertheless absolute and unlimited, and that the grantee is to regard them merely as advisory or monitory, and may execute a power wholly irrespective of them and without limitation, if he sees fit so to do."

Oliver vs. *The Washington Mills*, 11 *Allen*, 268-78.

It is true, that the proviso is not technically, or in its form, an affirmative clause; yet, in ascertaining the intent by construction, it is respectfully urged, that the same principles are to be applied to it as if it were strictly affirmative. The clause provides, that nothing in this act shall be construed to *prevent* the shares from being included, etc. That is the same in effect as if it read, "this act shall be so construed as to *allow* the shares to be included, etc. The act does not require the States to include the shares in the valuation for the purposes of taxation, but only permits them to do so, by negativing any construction to the contrary which might be made from the character of the associations, and also, perhaps, *ex majori cautela*, from previous or subsequent clauses. Nevertheless it prescribes the precise mode in which the taxation shall be made; it confers on the States a privilege; it grants a power which, except by the grant contained in the proviso, the States would not possess; it confers on them a *new jurisdiction*, viz, to tax property in no wise under their control; not created by their sovereignty; not introduced into their territory, nor continued there by their permission; but within the exclusive jurisdiction, and under the exclusive control of Congress.

To the enjoyment of the grant thus made, a limitation as to place is annexed. That limitation is peremptory. As if to render the intention unquestionable, the strong and pertinent negative words are added, "*and not elsewhere.*" Upon the principles adopted in the construction of statutes strictly affirmative in form, as this proviso is affirmative in substance, with negative words added, the exact mode of exercising the power prescribed by the grant must be followed. The words of the proviso are therefore imperative and not directory, whether place mean one thing or another. And it may be added also that the conclusion thus arrived at, coincides with the result of all the cases on the point which declare that every limitation must be strictly observed.

3d. It was objected, in the argument before the Court below, that the construction of the phrase "*place in which such association is located,*" viz, the city, town, or village, and not the State, territory, or district of its location, as contended for by the plaintiff in error, would make the limitation as to place, an interference with the *mode* of taxation adopted by the States, and Congress have no right to impose a limitation of that character.

The Court below allude to this point three times in their opinion, as follows;

1st. "It is evident from the whole terms of the proviso that Congress did not contemplate a general tax by the State upon all the shares of the bank collectively, without reference to the jurisdiction which the State might have over the shareholder, because the *mode of taxation which it authorizes* is only by including the shares in the valuation of the personal property of the persons taxed."

Austin vs. *The Aldermen etc.* 14 *Allen*, 364.

2d. "We therefore think that the reference in the proviso to 'the place where the bank is located' was designed to define the State authority which was to be allowed to impose a tax, and not to limit the place of assessment. *By this construction we avoid a question of great difficulty in regard to the constitutional power of Congress to direct or regulate the mode of State taxation.*" *Id.* 365.

3d. "The proviso that a tax shall not be imposed upon the stock in national banks 'at a greater rate than is assessed upon other moneyed capital,' is a security against hostile and discriminating legislation by the States which might affect the establishment or continuance of the banks. But it is a *very serious question* whether Congress, having conceded to the States *the right to tax the stock*, either wholly, or with such limitations as are requisite to prevent partial or oppressive legislation against the banks can proceed to *prescribe the mode of taxation which the State shall adopt*, or require the State to discriminate between its own citizens in the taxation of the same kind of property." *Id.* 365.

In these several extracts there is an evident confusion of ideas. The statements are inconsistent with themselves, and deny in one place, a principle which is admitted in another. The inconsistency can be accounted for by the fact, that, while the Court were compelled to support the limitations, they found it difficult to do so upon the erroneous theory upon which their decision is based, viz, that the States possess, by virtue of their sovereignty, an original right to tax the shares of national banks, subject only to proper restrictions to be imposed by Congress. If however, the true character of the proviso be, as it is respectfully submitted it has been proved to be, the grant of a new power to the States, and not the limitation of a power originally possessed by them, there can be neither a *serious* nor any question at all, that Congress has the constitutional power to attach any limitation or conditions to its grant, which it deems proper, whether such limitations do or do not regulate or control the mode of State taxation.

The question stated to be a "*serious one*" or of "*great difficulty.*" is, whether Congress can direct or regulate the *mode of State taxation* or prescribe the *mode of taxation* which the State shall adopt.

This mode, it is respectfully submitted, is the whole code of the tax laws of a State, as contained in its statutes and expounded by its courts. In Massachusetts these laws are found in two

chapters of its General Statutes, altogether containing one hundred and ten sections (*Gen. Stats. of Mass. chap.* 11 *and* 12) besides several enactments in amendment of details. Many of the provisions have received judicial interpretations. They vary for different species of property. Real estate is always taxed in the town where it lies. Personal estate is generally, but not always, taxed where the owner resides on the first day of May. Stock in trade is taxed in the town where the owners hire or occupy stores, etc. to carry on their business, and not where they reside. *Id. chap.* 11, *sec.* 12, *pl.* 1.

Shares in all incorporated companies, except banks of issue and deposit, are taxed, not by the assessors of the towns, but by the State commissioner of taxes; *Stat.* 1865, *chap.* 283, and the holders of such shares are not required to include them in their lists submitted to the assessors, because the corporations are taxed and pay the amount to the State Treasurer.

The rate varies in every town, depending upon the amount each chooses to expend. No two towns in the State have the same rate.

The mode of ascertaining the amount of taxable property differs according to its character. The State commissioner of taxes settles the value of shares in corporations; the value of other personal property is determined by the assessors of each town, upon a list handed in by the owners, or by the doom of the assessors, without appeal, in default of a list.

All these particulars, and many others, are parts of the *mode of taxation adopted by the State.*

The proviso has prescribed three limitations. 1st. as to the mode of assessment, viz, by including the shares in the valuation etc. This limitation has been adopted by the State act. 2d. as to the place—which the State act has not adopted. 3d. as to the rate, also adopted by the State act and recognized by the Court below as valid, because it prevents hostile and discriminating legislation against the banks.

Each one of these limitations "directs or regulates the mode of State taxation." Each one "prescribes the mode of taxation which the State shall adopt." If Congress has no right to prescribe the *place of taxation*, it has no right to prescribe the rate of taxation, or the mode of assessment; because each of these equally directs or regulates the mode of taxation to be adopted by the State.

But the Court below recognizes the case of *Van Allan* vs. *The Assessors* as "an authoritative exposition of the law which this Court is required to follow." *Austin* vs. *The Aldermen, etc.* 362. That case decides that Congress has the power to limit the rate, for the Court unanimously reversed the judgment of the New York Court of Appeals, upon the ground that the limitation as to rate was not regarded. The proposition therefore, that Congress cannot direct or regulate the mode of State taxation is a false proposition; there is at least one instance where it may do so. That is admitted by the Court below. It necessarily follows, that if Congress has the constitutional right to prescribe one limitation on the State mode of taxing property created by itself, it has an equal right to prescribe as many such limitations of this character, as it chooses to prescribe, unless the doctrine of original right in the States to tax such property be adopted as the law.

But then the Court below seem to argue that the restriction as to rate, notwithstanding it is a clear regulation or direction as to the mode of taxation adopted by Massachusetts, is nevertheless valid, because it *is a protection to the banks against hostile or discriminating legislation.*

It is however, respectfully suggested, that this amounts only to saying, that if a good reason appears why Congress should make a limitation which directs or regulates the mode of State taxation, such limitation is valid; but if the Court below considers the reason not a good one, or cannot perceive any reason

for it, then it is a *serious question* and one of *great difficulty* whether such limitation can be imposed.

The reason of the limitation has, however, nothing to do with the power of Congress to annex it to their grant. The conclusion to which the Court below arrives, that the limitation as to rate is valid and binding on the States, *because it is a security against hostile and discriminating legislation against the banks,* is a clear *non sequitur* from the premises assumed in its opinion. For if Congress has no power to attach any such limitation, it has no more power to attach it with a good reason than with a bad one; with a reason which satisfies the Court below, than with a reason which fails to satisfy it. The *expediency* of exercising a power cannot confer the *right* to exercise it.

But the Court below, really abandon their whole argument. They reason one way and decide another, on this very question as to the validity of the limitation as to place.

By the tax laws of Massachusetts all personal estate *within* or *without* this State shall be assessed to the owner in the city or town where he is an inhabitant on the first day of May. *Gen. Stats. c.* 11, *s.* 12.

In Dwight vs. *the Mayor etc. of the City of Boston,* 12 *Allen* 316–23, decided in 1866, it was held that shares in foreign corporations, (meaning those in other States,) "when held by our citizens are here treated as so much personal estate, following the person of the owner, and taxable at their full value in this Commonwealth, regardless of what may be the foreign law as to taxation of the capital or any part of it elsewhere."

The court below says, that

"The question whether the taxation of the shares which was allowed to the States, should be imposed in the State where the bank was situated or in that where the stockholders might reside was that which it was designed to settle by the proviso. The result would appear to have been, that it was thought expedient that the taxation should be imposed in the State where the capital was invested and used and not in the State where the stockholders might happen to reside." *Austin* vs. *The Aldermen etc.* 364.

That Congress have therefore the right to limit the *place* of assessment, and thus, not only to direct and regulate the mode of State taxation, but as to national banks, directly to abrogate a State law by the condition annexed to their grant of taxation, is entirely conceded. Place in which the bank is located, is confined to the State of its location. The State cannot tax the shares of national banks located out of the State, although under its tax laws, as expounded in the case above cited, it can tax the shares owned by its citizens in every other bank or corporation located in any other State. And this opinion is confirmed by the subsequent case of *Flint* vs. *The Aldermen of Boston*, involving that single point alone. *The question of great difficulty*, whether Congress has the right to regulate or direct the mode of State taxation, is, therefore, answered. It follows inevitably, that if Congress has the power to limit the State of location, any other limitation as to place of location is equally within its power. Neither limitation is objectionable on the ground assumed, that it cannot regulate or direct the mode of State taxation.

But it is not true that Congress, by annexing the limitations in the proviso, in any way interferes with the mode of State taxation, or seeks, or pretends to direct or regulate that mode, either by the limitation as to rate, or as to place, or as to the valuation of the shares.

Congress, of its own free bounty, has granted to the States a valuable privilege, of doubtful constitutionality or expediency. To this grant it has attached three limitations or conditions. No State is compelled to accept the grant. Each is left at liberty to reject it on the terms offered. But every State, which accepts it, is bound by the plainest principles of law, to accept it *cum onere*. It cannot take the benefit and shirk the burden. New York accepted the grant, complied with the limitation as to place, but failed to comply with that as to rate. It was therefore obliged to amend its legislation, if it still desired to

enjoy the privileges conferred by the grant. Massachusetts also accepted the grant, but failed to comply with the limitation as to place. Attaching a condition to the exercise of a granted power, which Congress, either with or without reason, saw fit to annex to it, cannot be said to interfere with the legislation of the State. The law which Massachusetts passed, conforming to the limitations as to rate and mode of assessment prescribed by the proviso, was its own free act, uncontrolled by Congress. Had the State chosen to go further and to conform to the limitation as to place, it would have been eqnally the free act of the State. But this limitation was disregarded and Massachusetts has thus obtained by taxation, a large revenue to which it has no right under the terms of the currency act. The whole argument of the Court below rests upon the fallacy, that the States have the original right of taxing the shares of national banks without leave of Congress, subject only to such limitations as the Court think conform to the constitution; a fallacy which it is respectfully submitted has been entirely exposed.

A case, somewhat analogous in principle, may be found in the cession of jurisdiction to the United States, over land purchased within the State for national purposes. In each instance where land has thus been purchased, the State ceded jurisdiction with the reservation of concurrent jurisdiction for the service of all criminal and civil process on any part of the land ceded or in any building erected on it. In the cession of a part of Long Island Head for a light-house (*Stat. Mass.* 1819. c 69) a further condition was annexed, that the cession should be of force only so long as the land should be used for a light-house and no longer. The legislature of 1867 ceded jurisdiction of land for the enlargement of the arsenal in Watertown, with the condition that "exclusive jurisdiction shall revert to and revest in the Commonwealth of Massachusetts, when the said premises shall cease to be used for the purposes hereinbefore declared." (*Stat. of Mass.* 1867. *c.* 259.)

The Constitution of the United States provides (Art. 1, sec. 8) that, —

"The Congress shall have power" — "To exercise exclusive Legislation in all Cases whatsoever," — "over Places purchased by the Consent of the Legislature of the State, in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings;"

The consent, here required to vest in the United States exclusive legislation over places purchased for the purposes enumerated, is usually given in Massachusetts, and probably also in other States, by a cession of jurisdiction which reserves concurrent jurisdiction, on the part of the State for the service of criminal and civil process. In the case of *United States* vs. *Cornell* 2 *Mason's C. C. R.* 65–6, Judge Story says that, —

"A cession or (*of*) exclusive jurisdiction may well be made with a reservation of a right of this nature, which then operates as a condition annexed to the cession and as an agreement of the new sovereign to permit its free exercise as *quoad hoc* his own process."

The same doctrine applies to the point now under consideration. The cession or grant, by the United States to the several States, of power to tax the shares of national banks, is made with certain limitations. The State, which accepts the grant, accepts it with these limitations, "which operate as a condition annexed to the cession," or grant, and as an agreement of the State to observe and conform to the limitations imposed. It might as well be contended, that the concurrent jurisdiction reserved by the States, is an interference with the exclusive jurisdiction of Congress, as to contend that the limitations annexed to the power to tax the shares of the national banks, interferes with the mode of taxation adopted by the States. If it is an interference, the acceptance of the grant is an agreement by the State that such interference may be made. The same principle is asserted and maintained in *Searight* vs. *Stokes*. 3 *Howard* 151, in the reasoning of the court, p. 168.

Another illustration of the principle may be found in the grants of public domain to the several States. To these grants, generally, if not universally, Congress attaches conditions sometimes very stringent. Thus in the act donating lands for colleges (12 *U. S. Stats. at large* 503. *c* 130, *Sec.* 3) there are seven conditions annexed to the donation. One requires the State to supply any deficiency in a fund prescribed in the fourth section. Another prohibits the State from using any portion of the fund for the erection etc. of buildings, while another requires the State to make an annual report of the progress of the College, etc. These conditions require legislation on some subjects and prohibit it on others. They are clear restrictions on State legislation. Yet no one can reasonably doubt, that by accepting the grant, the State agreed to be bound by the restrictions on its sovereign power of legislation.

By the fifty-seventh section of the currency act, suits against national banks can be brought only in any State, county, or municipal Court in the county or city where the bank is located. The laws of Massachusetts (*Gen. Stats. c* 123. *Sec.* 5, *pl*, 3) require, that "when one of the parties is a corporation of any other description than is before mentioned in this section;" (that is not a city, town, county, school district, or parish,) transitory actions may be brought "in any county where such corporation has an established or usual place of business, or has held its last annual meeting, or usually holds its meetings; *or if the other party is a natural person, in the county where such person lives.*" If then the limitation in the proviso as to place, be an interference with the mode of taxation adopted by the State, the limitation as to the jurisdiction of its Courts, must, by parity of reasoning, be an equally objectionable interference with its judicial system. But such a proposition cannot be seriously advanced. Congress has the undoubted right to prescribe in what courts its own corporations shall be sued. It must have the same right to prescribe in what place the shares of such corpo-

rations shall be taxed, when it grants to the States the power to tax them. Both are conditions annexed to the grant; the one of a power to the States to tax; the other of a power to individuals to sue. The grant may be accepted or rejected at the will of the States. In neither case are they controlled or regulated in their action by Congress.

4. The Court below seem to argue in support of their construction of the proviso, that the construction contended for the plaintiff in error is contrary to the *intention* of Congress. Upon this point they say:

"We can see no reason why Congress, which was dealing with questions between the States and the nation, should have sought to make a distinction between shareholders living in the particular city, or town, or village, or ward, or county in which the bank is located, and other stockholders within the same State. Where the bank is located in a small place, such a distinction might exempt from taxation the larger portion of the shares. In the case of a county tax the whole assessment might be required by the State law to be made at a place where the bank was not located, even upon the shareholders residing at the place of its location."

Austin vs. *The Aldermen*, 14 *Allen*, 364.

"It is a very serious question whether Congress, having conceded to the States the right to tax the stock, either wholly, or with such limitations as are necessary to prevent partial or oppressive legislation against the banks, can proceed to prescribe the mode of taxation which the State shall adopt, or require the State to discriminate between its own citizens in the taxation of the same kind of property. *We cannot suppose that this was the intention of Congress.*"

Id. 365.

"But, looking at the subject matter upon which the legislation in question is based, and remembering that Congress were only called upon to consider the proper limitations of State authority in relation to the exercise of the functions of the national government, *we cannot suppose* that it was designed to interfere with or regulate the internal arrangements of the States upon a point so purely domestic as the *place* or *manner* of assessment of State taxes." *Id.* 366.

Upon this reasoning of the Court below as to the intention of Congress it is to be observed,

1. That the distinction as to *wards* of location, was not only not insisted upon, but not even mentioned there. It derives no countenance from the currency act, and would have been merely absurd if contended for.

2. That if a State chooses to require the place of valuation and assessment to be, not only the city etc. where the bank is located, but also the particular ward in a city, there can be no objection to it. New York made this distinction as to wards in its *statute of March* 9, 1865, as cited in *Van Allen* vs. *the Assessors, p.* 577; and by enacting that the assessment should be made in the town or ward where such association is located, adopts even a more limited construction of the word "*place*" than is contended for by the plaintiff in error.

3. When the Court below assert as follows, "remembering that Congress were only called upon *to consider the proper limitations of State authority in relation to the exercise of the functions of the national government;* it is not very clear what is intended. It is *supposed,* however, that the Court had in its mind the idea of an original authority in the States, to tax the shares of national banks without leave of Congress, and that the proviso was intended to impose the "*proper limitations*" on such original authority. But this fallacy, if such be the meaning of the Court, has already been so effectually refuted, as to need in this connection no further remarks.

4. All the reasoning of the Court below, in support of their construction, is a mere *argumentum ab inconvenienti,* the weakest kind of argument in any case, and hardly allowable in the construction of a statute, even where it is of doubtful meaning upon a fair consideration of its language.

"Where only a political regulation is made, which is inconvenient, if the intention of the legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind when the words are

taken in their ordinary sense, it would be going a great way to say that a constrained interpretation must be put upon them, to avoid an inconvenience which ought to have been contemplated in the legislature when the act was passed, and which, in their opinion, was probably overbalanced by the particular advantages it was calculated to produce."

United States vs. *Fisher et al.* 2 *Cr.* 358.

If therefore, as the plaintiff in error has contended, and still respectfully insists, the language of the proviso is sufficiently intelligible to leave no doubt in the mind when the words are taken *in their ordinary sense*, the *reasoning* of the Court below has no force at all to uphold its conclusion.

3*d*. This reasoning is vicious for another cause. Congress, in passing the currency act, was dealing, as the Court below truly say, "*with questions between the States and the nation.*" It certainly did not consider how the provisions of the act would affect Massachusetts alone. The reasoning of the Court below, therefore, to be of any avail to support their conclusion, requires that each State should have the same system of taxation as that prevailing in Massachusetts; or at least, that the inconveniences, enumerated by the Court, to arise from the construction of the plaintiff in error, should be equally felt in all the other States. The whole argument proceeds upon this assumption, for the Court is construing a law of Congress which applies to other States besides Massachusetts. That this assumption is unwarrantable, is apparent from the system of taxation prevailing in California. In all cases of taxation in that State, whether for State, county, city or town purposes, taxes are levied on the property in its actual *situs*, and not in the residence of its owner.

California Statutes, c. 127, §§ 18–19. *Id. c.* 12, § 26.
Id. c. 16.

Thus, for example, for town purposes, "the Board of Trustees" of the town are authorized "to lay and collect annually a tax on *all property in the town*, not exceeding fifty cents on every

hundred dollars, of the assessment valuation thereof." (*Id. c.* 16, *s.* 6.)

There was, therefore, when the currency act was passed, at least one State where the inconveniences relied on would not exist. The reasoning fails then, because it proceeds upon an assumption which should be universally true, but which is proved not to be so.

"If this be an abstract truth, it may be supposed universal; but it is not universal; and therefore its truth cannot be admitted, in these broad terms in any case."

Per C. J. Marshall in Providence Bk. vs. *Billings*, 4 *Pet.* 562.

This is the strict logical conclusion. At all events, the evil consequences asserted to follow from the construction of the plaintiff in error, ought to be the general, if not the universal result of it. But this nowhere appears. The argument of the Court below reduced to its elements is only this — the construction contended for would be inconvenient to Massachusetts; therefore Congress did not intend such a construction. The fairer inference is, that Congress inserted the limitation as to place, as conforming to, rather than conflicting with the system of taxation generally prevailing in the States; and, as already intimated, to adopt the policy of favoring the locality, in and from which the business of the banks is conducted.

Again, it may be asked if the intention be, as the Court below *suppose*, why did not Congress use in the proviso the words "State or territory," instead of the word "*place*," found there? If such had been its intention, it would have been a very easy matter to substitute words of larger signification than the one actually used. The word "*place*" is defined by the statute itself in sixteen out of seventeen instances of its occurrence. Why was the same word used, in the proviso alone, in a different sense from that in the sixteen other instances? It is repeatedly

dropped where the intention was to signify a larger extent of territory than a city, town, or village, and appropriate words used to indicate such intent. If the intention of the proviso were different, why was the word the same? It is respectfully submitted that no satisfactory answer has been given to these questions by the Court below. That their reasoning upon the construction of the proviso is mere speculation as to the intention of Congress.

Courts must not, in order to give effect to what they may *suppose* to be the intention of the legislature, put upon the provisions of a statute a construction not supported by the words;

"Now, the latter statute requires that the indenture shall be approved of by the justices under their *seals*. I cannot tell why the legislature requires that the indenture should be approved of under their seals; but they have so required it in express terms, and I cannot say that they did not mean that which they have so expressed." *Rex* vs. *The Inhabitants of Stoke Damrell*, 7 *B. & C.* 570.

"It is very desirable, in all cases, *to adhere to the words of an act of Parliament, giving to them that sense which is their natural import in the order in which they are placed.*"

Rex vs. *Ramsgate*, 6 *B. & C.* 712.

"We think it much the safer course to adhere to the words of the statute construed in their ordinary import, than to enter into any inquiry as to the *supposed* intention of the persons who framed it."

Rex vs. *The Inhabitants of Great Bentley*, 10 *B. & C.* 526–7.

"I cannot speculate as to the intention of the legislature. The words appear to me to be quite plain."

Per Patterson J. Samuel vs. *Nettleship*, 2 *Q. B. R.* 188.

"It is not for the Court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions."

Denn vs. *Reid*, 10 *Pet.* 527.

It is further said by the Court below, in support of their construction of the word "*place*," that "it harmonizes with the phraseology of the 40th section of the act, where it is provided that the banks shall keep lists of the stockholders, with their places of residence and the number of shares held by each, 'subject to the inspection of the officers authorized to assess taxes under State authority.'"

Austin vs. *The Aldermen, etc.* 365.

It is not easy to perceive where this alleged harmony is found. If it exists at all, it amounts to nothing more than to show, that, however much the construction of the Court below militates with all the rest of the act, it is consistent at least with the 40th section. It must rest, on the following or similar grounds, if on anything, viz: as the officers, authorized to assess taxes under State authority are empowered by Congress to examine the lists of shareholders in *every* bank in the State, it was intended that such officers might assess taxes upon the shares according to the State laws in the place of the shareholders residence, for otherwise such unlimited power of inspection would be useless. If Congress intended that persons should be taxed on their shares, only when they owned them in a bank located in the town of their residence, it would not have subjected the lists to the inspection of *all* the officers of the State authorized to assess taxes, but only to the inspection of those officers residing in the town where the bank was located.

But, 1st, as Congress "*was dealing with questions between the States and the nation*," and not with questions merely between Massachusetts and the nation, the conclusion, which the Court below seems to intimate may be legitimately drawn from this supposed harmony, is a clear *non sequitur*, unless every town in every State of the Union, should, like the towns in Massachusetts, have its own board of assessors.

2d. Congress, when it granted to the States authority to tax the shares of national banks, knew that each State had officers empowered to assess taxes according to *some* system. It must have known, what every person of common intelligence knows, that while a general uniformity exists between the laws of the several States, these laws differ, not only in the subjects of legislation, but also in many details relating to common subjects of legislation. It could enact no law exactly applicable to each detail of the various systems of taxation. Therefore, in regard to taxing the shares of the national banks, it used general terms, empowering all the officers authorized to assess taxes by State authority, to examine the lists of all the banks. If any State should happen to have only a single board of assessors for the whole State (which is the case in Massachusetts with respect to certain species of property,) such board would be necessarily compelled to examine the lists of every bank. If taxes should be assessed in any State by counties (which is the case in California,) the county assessors must examine the lists of all the banks located anywhere in the county of which they are the assessors. When there is a board of assessors for every town in the State, the necessary examination is still more restricted; and would then be confined to the town in which a bank was located. Congress, not caring to inquire into the extent of jurisdiction possessed by any set of officers authorized to assess taxes, empowered them all, without a distinction which it was impossible to make, and which if possible would be useless when made, to examine the lists of *all* the banks in the State, leaving it to the common sense of the officers, to make such examination, as the right of taxation granted, required them to make. However far the examination was carried, taxes must nevertheless be assessed only in the mode and at the place authorized by the proviso. The construction of the plaintiff in error, therefore, harmonizes as well with the 40th section, as that of the Court

below. No argument then, in favor of either construction, can be drawn from this consistency.

To support their conclusion, the Court below further say, "the same construction has also been approved by the Supreme Court of Pennsylvania in the recent case of *Markoe* vs. *Hartranft, Am. Law Register* (*June* 1867) 487." *Austin* vs. *The Aldermen, etc. p.* 365.

Whether their construction is, or is not thus approved, can be perceived by the following extract from the opinion of that Court, before whom the question did not arise, and which they did not undertake to determine.

"I have, so far, left out of view these words in the proviso: 'at the place where such bank is located, and not elsewhere.' It is very difficult to assign the true connection and relation of these words in the sentence. I think, however, their purpose is not to localize the assessment of the taxes at the place where the bank is located, but to localize the authority which imposes the tax. To localize the assessment at the place where the bank is, would be either to confine the assessment to the bank itself on behalf of its shareholders, or to confine it to the shareholders residing at the place where the bank is located. The former is inconsistent with the express words of the remainder of the sentence requiring the share to be included in the valuation of the personal property of the shareholder, and the single duty imposed upon the bank of furnishing the list of names, residences, and number of shares, for the inspection of the assessor. The latter would be, at least consistent with the intent to assess the individual shareholders, but savors of injustice in exempting other shareholders residing outside of the place where the bank is located. *I would prefer*, therefore, to connect locality with the authority which immediately precedes and stands connected with it; *but if this cannot be done, the language can be harmonized only by confining the assessment of shares to those living within the place where the bank has its location.*"

If this conditional preference of one construction to another, upon a question which did not arise in the case, can be considered as an approval of that given by the Court below, it is fairly offsetted by the three opinions heretofore cited, of the Courts of

Maine and New Hampshire before whom the exact point was raised, and argued, and decided adversely to the preference of the Court in Pennsylvania, and to the decision in Massachusetts.

The opinion of the Court below is then clearly erroneous in two particulars, and should therefore be reversed.

First; In holding that the States have the original right, as sovereignties, to tax the shares in the national banking associations, independent of any grant, or concession in this respect by Congress.

Second; In their construction of the Act of Congress by which the national banking associations were established; by which construction they have adopted an erroneous and enlarged interpretation of the word "*place*," as used in the forty-first section of the act.

All of which is respectfully submitted by

IVERS J. AUSTIN,
Counsel for plaintiff in error.

APPENDIX.

CHAP. 242. AN ACT RELATING TO RETURNS AND TAXATION OF SHARES IN ASSOCIATIONS FOR BANKING, ESTABLISHED UNDER THE LAWS OF THE UNITED STATES.

Be it enacted, etc., as follows:

SECTION 1. The assessors of every city and town in this Commonwealth, in which any association for the purposes of banking is or shall be established by authority of the United States, shall annually, between the first and tenth day of May, obtain from the proper officers of such association a full and correct list of the names and residences of all shareholders in the association, and the number of shares held by each; they shall also ascertain the amount of the capital stock of such association, the par value and the fair market value of each share, and the amount and value of real estate held and owned by such association, and where the same is located.

SECTION 2. It shall be the duty of such assessors, on or before the first day of June in each year, to transmit to the assessors of the several cities and towns of the Commonwealth a true copy of the list and a correct statement of the other facts required to be obtained in accordance with the first section of this act.

SECTION 3. The assessors of each city and town in which any shareholder in such association resides, shall include all the shares in such associations held by persons resident and liable to taxation in said city or town, in the valuation of the personal

property of such person, for the asssessment of all taxes imposed and levied in said town by authority of law, to be assessed at the same rate, and subject to the same deductions as shares of State banks and other moneyed corporations in the hands of the citizens of such city or town.

SECTION 4. The information required by this act to be obtained annually, between the first and tenth days of May, may be obtained the present year on or before the tenth day of June, and the returns required by the provisions of this act to be made on or before the first day of June shall be made the present year on or before the first day of July.

SECTION 5. The assessors of the city of Boston shall be entitled to have the time for the services and returns required by this act, extended for a period of twenty days from the respective dates therein fixed.

SECTION 6. This act shall take effect upon its passage.

Approved May 15, 1865.

Supreme Court of the United States.

DECEMBER TERM, 1868.—NO. 123.

JAMES T. AUSTIN,

PETITIONER FOR CERTIORARI,

PLAINTIFF IN ERROR,

VS.

THE BOARD OF ALDERMEN OF THE CITY OF BOSTON,

DEFENDANTS IN ERROR.

POINTS AND AUTHORITIES FOR THE DEFENDANTS IN ERROR.

BOSTON:
ALFRED MUDGE & SON, CITY PRINTERS, 34 SCHOOL STREET.
1869.

Supreme Court of the United States.

DECEMBER TERM, 1868.

No. 123.

JAMES T. AUSTIN, PETITIONER FOR CERTIORARI,

PLAINTIFF IN ERROR,

vs.

THE BOARD OF ALDERMEN OF THE CITY OF BOSTON,

DEFENDANTS IN ERROR.

This is a writ of error to the Supreme Judicial Court of Massachusetts to reverse its judgment, affirming, on *certiorari*, a tax assessed by the defendants in error upon certain shares in National Banking Associations situated in Boston. The tax was assessed under the Massachusetts statute of 1865, chap. 242, sec. 3, which is as follows: "The assessors of each city and town, in which any shareholder in such association resides, shall include all shares in such associations held by persons resident, and liable to taxation in said city or town, in the valuation of the personal property of such person, for the assessment of all taxes imposed and levied in such town by authority of law, to be assessed at the same rate, and subject to the same deductions, as shares of State banks, and other moneyed corporations in the hands of the citizens of such city or town."

The plaintiff in error, who is a citizen of Boston, contends that this statute conflicts with the provisions of the United States statute of 1864, chap. 106, sec 41, — 13 U. S. Stat. at Large, 111, 112, — as the proper construction of that act requires that any tax assessed on such shares shall be assessed in the city or town where the bank is situated. The decision of the Supreme Court of Massachusetts is reported in 14 Allen, 359.*

* See post, 8.

POINTS AND AUTHORITIES FOR THE DEFENDANTS IN ERROR.

I.

The right of the States to tax in the hands of their citizens shares in national banks under the U. S. Stat. of 1864, chap. 106, sect. 41, has been fully established.

Van Allen *vs.* The Assessors, 3 Wallace, 573.
People *vs.* The Commissioners, 4 Wallace, 244.
Bradley *vs.* The People, 4 Wallace, 459.

II.

The plaintiff in error resides in Boston, the place where the banks are situated, and, admitting his construction of the above act to be the true one, its terms have been literally complied with in his case.

It was objected, when this case was before the Supreme Court of Massachusetts, that this view would conflict with the provisions of the Constitution of Massachusetts requiring that all taxation shall be equal; but the Court threw out a strong intimation of an opinion the other way. Mr. Justice Hoar, in delivering their judgment, said: —

"If a statute of the Commonwealth provides for taxing a certain description of property, it would not follow that the tax is unequal, and therefore prohibited by the Constitution, because some part of it might be exempt from taxation under the laws of the United States, or for any other reason. The statute would be simply inoperative upon the property exempted, and would be construed as not applying to it. An exemption in a tax act, applicable equally to all persons in a similar situation, is usually not to be deemed a violation of that substantial equality in the distribution of public burdens which it is the design of the Constitution to secure."

14 Allen, 363, *post*, 12.

So strong an intimation of the proper construction of the Constitution of Massachusetts, made by the highest State court, will be followed by this court.

Provident Institution *vs.* Massachusetts, 6 Wallace, 630 and cases cited.

Jackson *vs.* Lamphere, 3 Pet. 280.

III.

But, if the above position is wrong, the counsel for the defendants in error contend that the construction put upon the United States statute of 1864, chap. 106, sect. 41, by the Supreme Court of Massachusetts, is the correct one.

(1.) It is a familiar principle of interpretation, that punctuation forms no part of a statute, and that a limiting clause is confined to its next antecedent, unless the construction of the statute specially demands its being made an exception to this general rule.

Cushing *vs.* Worrick, 9 Gray, 382.

Guier's case, Dyer, 46b.

Noy's Maxims 2.

Dwarris on Statutes (2d ed.), 590, 591, 601.

Applying this rule to the statute under consideration, and the more natural construction of it will be that the limiting clause, "at the place where such bank is located," designates the locality of the authority which is to impose the tax, and not the place in which the tax is necessarily to be assessed. The statute will then read as follows: —

"Provided that nothing in this act shall be construed to prevent all the shares in any of said associations held by any person or body corporate from being included in the valuation of the personal property of such person or corporation in the assessment of taxes *imposed by or under State authority at the place where such bank is located and not elsewhere* but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

This construction effectuates the obvious intention of Congress, which was not to interfere with the inherent right of taxation in

the States, so long as it should be equitably imposed, but to prevent the shares in national banks from being unduly taxed, and thus impeded in their operations. This same section provides that the rate of taxation shall not exceed that imposed upon banks organized under State authority, and allows the taxation of real estate owned by national banks.

See also *Congress. Globe* for 1863–4, pp. 1957, 1958, 1959, 2621, 2622.

(2.) It is apparent that there might be reasons why the shares in a National bank should not be taxed out of the State in which the bank is situated, — because, in that way, where the systems of taxation are different (as they are, for instance, in New York and Massachusetts,) the shares would be liable to double taxation. But what conceivable interest can it be to anybody, except citizens of Massachusetts, whether shares owned by citizens of Springfield in a national bank established in Boston are taxed in Springfield or in Boston; and, so long as the tax does not exceed that imposed upon other moneyed capital in the State, what interest is it to the bank itself, or its shareholders?

(3.) The declaratory Act of Congress, of February 10, 1868, enacting that the words "at the place where the bank is located, and not elsewhere," "shall be construed and held to mean the State within which the bank is located," is a legislative construction of this statute which this court will follow.

IV.

This is also the proper construction of the statute, because, with great respect to Congress, it is contended that otherwise this provision of the Act of 1864 would transcend the power of Congress as interfering with the sovereign right of each State to regulate its own local affairs.

(1.) The only restrictions upon the sovereign rights of the several States to tax their citizens, as between themselves and the Federal Government, are those imposed by the Constitution of the United States.

McCulloch *vs.* State of Maryland, 4 Wheat. 425, 429, 430.
Providence Bank *vs.* Billings, 4 Pet. 563.
Federalist, No. 32 (Hamilton's ed.), pp. 252, 253.
1 Kent's Com. (6th ed.), 391, *et seq.*

And Congress cannot enlarge these restrictions.

People *vs.* Hoffman, 37 N. Y. 9.

The only restrictions expressly imposed by the Constitution are in regard to exports and imports. The restrictions, which it has been held by necessary implication are likewise imposed by the Constitution, are as to the taxation of the property and instruments of government of the United States, and of the national securities.

Const. U. S., art. 1, sect. 10.
McCulloch *vs.* State of Maryland, 4 Wheat. 316.
Osborn *vs.* United States Bank, 9 Wheat. 738.
Weston *vs.* City Council of Charleston, 2 Pet. 449.
Bank of Commerce *vs.* City of New York, 2 Black, 620.
Bank-Tax case, 2 Wallace, 200.

And so, following the celebrated limitation put by Chief Justice Marshall upon the decision in the case of McCulloch *vs.* State of Maryland (4 Wheat. 436), there are high authorities for what would seem to be the necessary result of this principle that States have an inherent right to tax the shares in national banks in the hands of their own citizens.

1 Kent's Com. 425, 427.
Denio, C. J., in City of Utica *vs.* Churchill, 33 N. Y. 233, 234.
Speeches of Senators Fessenden and Collamer, Cong. Globe for 1863-4, pp. 1895, 1899.

See also:

The Queen *vs.* Arnaud, 9 Q. B. 806.
Van Allen *vs.* Assessors, 3 Wallace, 584, 585, by Nelson, J.
Society for Savings *vs.* Coite, 6 Wallace, 594.
Provident Institution *vs.* Massachusetts, 6 Wallace, 611.

(2.) The only right, therefore, which Congress has to regulate at all the taxation of shares in national banks is derived from the principle that the power to create carries with it, as Chief Justice Marshall says, the power to preserve; and Congress therefore can prevent its own creatures, the national banks, from being impeded in their operations, or, in an extreme case, destroyed by the taxation of the shares in the hands of the shareholders. And the

defendants in error contend that it was to prevent this that the proviso in the 41st section of the U. S. Stats. of 1864 was framed.

That statute did not grant a new right of taxation to the States.
Nelson, J. in Van Allen *vs.* Assessors, 3 Wallace, 585.

Therefore the section must be construed as imposing a limitation for the protection of the banks upon a right of taxation already existing; and of course the limitation cannot be extended beyond the power of Congress over the subject-matter, and this must be confined to the prevention of over-taxation. For, if Congress could impose such a condition as this, it might go further, and prescribe the day of the year, and even the time of the day, when taxes upon these shares should be assessed, and regulate the manner of levying taxes upon personal property, for State purposes, throughout the Union.

But Congress possesses no such power: the right of taxation is one of the incidents of sovereignty necessarily possessed by the States, and, within the limits of its sovereignty, each State is supreme, and subject to no control by Congress; and within these same limits the Federal government has no more right to impede the action of the State governments by interfering with their systems of taxation than the State governments would have to impede in a similar manner the action of the Federal government. The reason why a State cannot tax the property or instruments of government of the United States is, not because its power of taxation is subordinate to Congress, but because it is limited in extent, and, in the language of Chief Justice Marshall, it does not "extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States."

Congress, therefore, in some cases, may interfere with State taxation, so far as regards the subjects of taxation; never, as regards the manner of it.

(3.) If, therefore, the natural construction of the particular words in the proviso of section 41 of the statute of 1864 would give it the meaning contended for by the plaintiff in error, the court, in view of the consequences which would follow, will put upon them a

more artificial construction, according to what a distinguished English judge calls the golden rule by which judges are to be guided in construing statutes, namely, "to look at the precise words of the statute, and construe them in their ordinary sense, if such construction would not lead to any absurdity or manifest injustice; but, if it would, then so to vary and modify the words used as to avoid that which it certainly could not have been the intention of the legislature should be done." This accords with the maxim of the civil law adopted by Lord Bacon: *In ambigua voce legis ea potius accipienda est significatio quæ vitio caret, præsertim cum etiam voluntas legis ex hoc colligi possit.*

Lord Chief Justice Jervis in Abley *vs.* Dale, 11 C. B. 390
Broom's Maxims (3d ed.), 513.

For these reasons it is respectfully contended that the 41st section of the U. S. Statute of 1864 cannot be construed to limit the right of State taxation of shares in national banks, to the taxation in the city or town in which the bank is situated, that the Massachusetts statute of 1865 in no way conflicts with it, and that the judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

JOHN P. HEALY,
CLEMENT HUGH HILL,
Of counsel for the City of Boston.

APPENDIX.

James T. Austin *vs.* Board of Aldermen of the City of Boston.

[Reprinted from 14 Allen 359—366.]

A State may tax shares held in national banks organized therein under U. S. Statute of 1864 chap. 106, and may authorize the assessment of such tax in the city or town within the same State where the owner resides.

Petition for a writ of *certiorari* to the board of aldermen of the city of Boston. The facts set forth were in substance as follows: —

The petitioner, a resident of Boston, duly handed in to the assessors of the city a list of his personal property, claimed to be liable to taxation. In this list were comprised the shares owned by him in seven banks, incorporated in Boston under the national banking act of the United States. When the list was handed in to the assessors, the petitioner protested that the shares in said banks were not legally liable to be taxed. The assessors nevertheless assessed the same. Thereupon the petitioner applied to the assessors for an abatement of so much of the assessment as was laid upon said shares. The application being rejected by the assessors, the petitioner applied in due form and time to the board of aldermen for a revision and reversal of the action of the assessors, and this application was rejected.

The defendants admitted the facts set forth in the petition, and asserted that the tax referred to was legally assessed.

The case was reserved by *Wells*, J., for the determination of the full court.

C. B. Goodrich & I. J. Austin, for the petitioner. The proviso in U. S. St. of 1864, *c.* 106, § 41, is unconstitutional. National banking associations, organized under that statute, are meansand instruments employed in the exercise of the functions of the federal government, and the right to tax such means and instruments is exclusively in Congress. See *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Weston* v. *City Council of Charleston*, 2 Pet. 449; *People of New York*

v. *Commissioners of Taxes*, 2 Black, 620; *Bank Tax Case*, 2 Wallace, 200. The *St.* of 1865, *c.* 242, § 3, does not conform to the requirements of that proviso. The proviso in the U. S. Statute authorizes the share to be included in the valuation only in the place where the bank is located; but the statute of Massachusetts authorizes the shares to be included in the valuation in the place where the owner resides. The proviso in the Act of Congress is to be construed strictly, because it imposes a burden upon the citizen. *Freeland* v. *Hastings*, 10 Allen, 575. *Sewall* v. *Jones*, 9. Pick. 414. It contains a grant of power to the States, and therefore should be construed strictly against the grantees.

The word "place," as used in the proviso, means the specific city or town, and not the State, in which the bank is situated. Such is its signification in other parts of the same act; §§ 6, 7, 8, 23, 30, 34, 46. Dwarris on Sts. 574–576. Such is also its natural signification. *Opinion of Justices*, 7 Mass. 524. Other phrases in the same act confirm this; §§ 10, 15, 18, 32. When a larger extent of territory is meant, the phraseology is changed; §§ 9, 30, 40, 43, 57. The requirement is peremptory, and not merely directory. *Oliver* v. *Washington Mills*, 11 Allen, 278. *The King* v. *Justices of Leicester*, 7 B. & C. 12. Dwarris on Sts. 477, 610. It is no objection to this construction that this State, and perhaps other States, may lose the benefit of the U. S. statute. *The King* v. *Poor Law Commissioners*, 6 Ad. & El. 7. *Rex* v. *Stoke Damerel*, 7 B. & C. 569. *Rex* v. *Ramsgate*, 6 B. & C. 712. *Rex* v. *Great Bentley*, 10 B. & C. 526–7. *Green* v. *Wood*, 7 Q. B. 178. *Samuel* v *Nettleship*, 3 Q. B. 188. This State may change its method of taxation.

J. P. Healy & C. H. Hill, for the respondents.

Hoar, J. The petitioner, a resident of the city of Boston, having been assessed in that city upon his shares in several national banks there established, asks that a writ of *certiorari* may issue to vacate and set aside the assessment. His petition is placed upon two grounds.

1. That a State has no constitutional authority to tax the shares in banks created by the government of the United States; and

2. That if, under the proviso in the act of Congress of 1864, the States have the right to tax the shares in the national banks to which that act relates, the tax is invalid, because the law of Massachusetts does not conform to the proviso.

We have no difficulty, either on principle or authority, in coming to the conclusion that the first of these propositions cannot be supported. "That the power of taxation," said Chief Justice Marshall, "is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments, are truths which have never been denied." *McCulloch* v. *Maryland*, 4 Wheat. 425. The whole property of the citizens of a State is subject to the taxing power of the State; but the State cannot tax an instrument employed by the government of the United States in the execution of its powers. The States, therefore, cannot impose a tax upon the national banks. But, as was said in *McCulloch* v. *Maryland*, this limitation "does not extend to a tax paid by the real property of the bank in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the State." 4 Wheat. 436. This remark was not essential to the decision of the case, and has only the force of a disclaimer of the intention to make a broader application of the doctrines on which the decision rests than was required by the judgment rendered. But in subsequent cases the distinction between a tax upon a bank, or the capital of a bank, established by Congress, and a tax upon the shares of its stock owned by citizens of a State, has been fully recognized; and it has been held by the Supreme Court of the United States that the States have the right to tax the stock held by their citizens in the national banks, except so far as the Act of Congress has expressly or by implication restricted the exercise of the right.

In *Van Allen* v. *The Assessors*, 3 Wallace, 573, the judgment of the court was that the tax was invalid, because it was not levied in conformity with the stipulations of the Act of Congress of June 3, 1864, in that it imposed a higher rate of taxation than other moneyed capital. But in stating the reasons of the decision, the court say that, as such a tax "respects a subject-matter over which Congress and the States may exercise a concurrent power, but from the exercise of which congress, by reason of its paramount authority, may exclude the States, there is no doubt Congress may withhold the exercise of that authority and leave the States free to act." The whole court concurred in the decision; the only division

of opinion being upon the question whether the shares of the capital of national banks were subject to State taxation without any reference to the amount of such capital invested in bonds of the United States. In the subsequent case of *People* v. *The Commissioners*, 4 Wallace, 244, a State tax on the shares of national banks, which conformed in all respects to the limitations imposed by the Act of Congress, was held to be constitutional and valid. These two cases are decisive upon the first point, and, as they relate to the construction of the Constitution and laws of the United States, are an authoritative exposition of the law which this court is required to follow.

It only remains, therefore, to consider and determine whether the tax imposed on the petitioner violates any of the requirements of the act of 1864.

The proviso upon which he relies is in the 41st section, and is in these words: "Provided that nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation, in the assessment of taxes imposed by or under State authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." The statute under which the assessment of which he complains was made authorizes the shares to be included in the valuation of personal property wherever the owner resides within the State. Stat. 1865, chap. 242, sect. 3.

It is not denied that the particular assessment upon the petitioner conforms literally to the terms of the proviso in every respect. He was assessed for his shares at the place where the banks were located, which is the place of his residence, and not at a greater rate than was assessed upon other moneyed capital. But it is argued on his behalf that the tax is to be assessed only at the place where the bank is located; that the tax assessed on other stockholders resident in other towns or cities in the Commonwealth is prohibited by the terms of the proviso; and that this either makes the whole mode of assessment illegal, because exceeding the limitation prescribed by the Act of Congress, or is in conflict with the constitution of the Commonwealth which requires equality of taxation.

We are by no means satisfied that the last reason is a sound one. If a statute of the Commonwealth provides for taxing a certain description of property, it would not follow that the tax is unequal, and therefore prohibited by the Constitution, because some part of it might be exempt from taxation under the laws of the United States, or for any other reason. The statute would be simply inoperative upon the property exempted, and would be construed as not applying to it. An exemption in a tax act, applicable equally to all persons in a similar situation, is usually not to be deemed a violation of that substantial equality in the distribution of public burdens which it is the design of the Constition to secure.

But, without deciding that question, the court are all of opinion that the true construction of the proviso does not confine the assessment of the tax to the place where the bank is located, and that it merely requires that the tax, to be valid, shall be imposed under the State authority existing at the place where it is thus located. The language of the act is not entirely perspicuous; but this construction seems to be as consistent with it as any other, and is best adapted to effectuate what we think must have been the intention of Congress.

We think the question whether the taxation of the shares which was allowed to the States should be imposed in the State where the bank was situated, or in that where the stockholders might reside, was that which it was designed to settle by the proviso. The result would appear to have been, that it was thought expedient that the taxation should be imposed in the State where the capital was actually invested and used, and not in the State where the stockholders might happen to reside. If the general authority to tax the shares had been given without restriction, the result might have been a double taxation of shares owned by persons not residing in the State where the bank was situated. It is evident from the whole terms of the proviso that Congress did not contemplate a general tax by the State upon all the shares of the bank collectively, without reference to the jurisdiction which the State might have over the shareholder, because the mode of taxation which it authorizes is only by including the shares in the valuation of the personal property of the persons taxed.

The effect of the construction which we give is open to the objection that it relieves from the taxation of their shares the share-

holders not residing in the State, or at least that it may do so under our system of taxation. But on the other hand we can see no reason why Congress, which was dealing with questions between the State and the nation, should have sought to make a distinction between shareholders living in the particular city, or town, or village, or ward, or county in which the bank is located, and other stockholders within the same State. Where the bank is located in a small place, such a distinction might exempt from taxation the larger portion of the shares. In the case of a county tax, the whole assessment might be required by the State law to be made at a place where the bank was not located, even upon the shareholders residing at that place of its location. We therefore think that the reference in the proviso to "the place where the bank is located" was designed to define the State authority, which was to be allowed to impose a tax, and not to limit the place of assessment. By this construction we avoid a question of great difficulty in regard to the constitutional power of Congress to direct or regulate the mode of State taxation. Assuming that Congress has the right to prohibit the taxation of the stock of an institution created by a law of the United States, as an instrument for the performance of functions belonging to the national government, it may follow that this prohibition may be absolute or conditional. The proviso that a tax shall not be imposed upon the stock in national banks "at a greater rate than is assessed upon other moneyed capital" is a security against hostile and discriminating taxation by the States, which might affect the establishment or continuance of the banks. But it is a very serious question whether Congress, having conceded to the States the right to tax the stock, either wholly, or with such limitations as are requisite to prevent partial or oppressive legislation against the banks, can proceed to prescribe the mode of taxation which the State shall adopt, or require the State to discriminate between its own citizens in the taxation of the same kind of property. We cannot suppose that this was the intention of Congress.

The construction which we have given harmonizes with the phraseology of the 40th section of the act, where it is provided that the banks shall keep lists of the stockholders, with their places of residence and the number of shares held by each, "subject to the inspection . . . . of the officers authorized to assess taxes under State authority." The same construction has

also been approved by the Supreme Court of Pennsylvania in the recent case of *Markoe* v. *Hartranft*, 6 Amer. Law Reg. (N. S.) 487.

We have been informed that a different interpretation of the proviso has been given by the justices of the Supreme Court of Maine in an opinion given to the legislature of that State; and by the Supreme Court of New Hampshire, in the case of the *First National Bank of Portsmouth* v. *Portsmouth*, which is not yet published. We regret that we have had no opportunity to see a statement of the reasons on which these eminent tribunals were led to this result, in which we have been unable to concur; but we are not surprised that the language of the Act of Congress should be found so ambiguous as to make its literal import uncertain, or capable of more than one construction. But, looking at the subject-matter upon which the legislation in question is based, and remembering that Congress were only called upon to consider the proper limitations of State authority in relation to the exercise of the functions of the national government, we cannot suppose that it was designed to interfere with or regulate the internal arrangements of the States upon a point so purely domestic as the place or manner of assessment of State taxes.

Petition dismissed with costs.